ıme Court, U.S.
I L E D

931458 MAR 17 1994

No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

CBC, INC.; LYNELL G. SKARDA; LANGDON L. SKARDA; AND KENT CARRUTHERS, Institution-Affiliated Parties of CBC, Inc.,

Petitioners,

vs.

BOARD OF GOVERNORS OF THE FEDERAL SYSTEM,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

LYNELL G. SKARDA, *Pro Se*
Attorney for Petitioners
P.O. Box 400
Clovis, New Mexico 88101
(505) 762-9163

4882
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

89 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER $30,000 OF CIVIL MONEY PENALTIES UNDER 12 U.S.C. §1847(b)(2) FOR THE BHC NOT FILING AN AUDIT FOR 1988 IS ARBITRARY, CAPRICIOUS, ABUSIVE OF DISCRETION, OR CONTRARY TO LAW, OR LACKS SUBSTANTIAL EVIDENCE WHEN:

(a) THE FEDERAL RESERVE BOARD HAD WAIVED AUDITS FOR 4 YEARS AND TAKEN NO ACTION ON 2 MORE YEARS;

(b) ALL WHILE PETITIONERS WERE LITIGATING WITH THE BOARD THE LEGALITY OF THE AUDIT REGULATION;

(c) THE BOARD DOES NOT REQUIRE A COMPARATIVE AUDIT WITH THE PRIOR YEAR THE FIRST YEAR AN AUDIT IS REQUIRED;

(d) PETITIONERS RIGHTFULLY CONCLUDED THAT THE BOARD WAS ALSO AWAITING THE FINALITY OF PETITIONERS' REVIEW BY THE COURTS;

(e) THE BOARD NEVER EVEN INTIMATED THAT PETITIONERS MIGHT BE SUBJECT TO

CIVIL MONEY PENALTIES UNTIL LONG AFTER CERTIORARI WAS DENIED;

(f) LACK OF A 1988 AUDIT HURT NO ONE, CAUSED NO MONETARY LOSS TO ANY ONE, NOR ANY DANGER TO THE BHC OR TO ITS LONE SUBSIDIARY BANK MAKES THE FAILURE DE MINIMIS?

2. WHETHER A USELESS AUDIT THE ABSENCE OF WHICH HAS BEEN COMPLETELY ERADICATED BY SUBSEQUENT AUDITS IS SUFFICIENT TO SUPPORT THE BOARD'S PENALTIES UNDER 12 U.S. §1847(b)(2) REQUIRING IT TO CONSIDER THE SIZE OF THE BHC, GOOD FAITH OF PETITIONERS, GRAVITY OF THE VIOLATION, AND MATTERS JUSTICE MAY REQUIRE WHEN THE BOARD IS OBVIOUSLY PUNISHING PETITIONERS FOR LITIGATING WITH THE BOARD WHICH EQUALLY NEEDED AN ADJUDICATION OF THE REGULATION'S VALIDITY.

TABLE OF CONTENTS

	Page
Questions Presented for Review.....	i
Table of Contents.....	iii
Table of Authorities.....	iv
Opinions Below.....	1
Statement of Jurisdiction.....	2
Constitutional Provisions, Statutes, and Regulations Involved.....	2
Statement of the Case.....	3
A. Jurisdiction of Tenth Circuit...	3
B. Facts - Stipulated.....	4
Reasons for Granting the Writ.....	12
A. The Lower Court Has Departed From The Accepted and Usual Course of Judicial Proceedings and Sanctioned Such a Departure By the Board As To Call For This Court's Power of Supervision....	12
B. Conflict With Other Courts of Appeal.....	19
C. Bank Regulators Use of Civil Money Penalties Requires Judicial Guidelines.....	25
Conclusion.....	25

Contents

TABLE OF AUTHORITIES

Page

Fifth Amendment..... 2,18

CASES CITED

Akin v. O.T.S., 950 F.2d 1180..... 16

Amberg v. FDIC, 934 F.2d 681..... 21

Anonymous v. FDIC, 617 F.Supp. 509..... 22

Butz v. Glover Livestock Co., 411 U.S. 182..... 13

CBC, Inc. v. Board of Gov., 855 F.2d 688..... 2

Bd. Gov. v. Dimension Fin., 474 U.S. 361..... 14

Central Bank v. U.S., 912 F.2d 897..... 21

Chapman v. U.S., 821 F.2d. 523..... 15

Dazzio v. FDIC, 970 F.2d 71..... 19

Dimension Fin. v. Bd. Gov., 744 F.2d 1402..... 14

Oberstar v. FDIC, 987 F.2d 494.... 20

Contents

Page

STATUTES CITED

5 U.S.C. § 702..... 2,4

12 U.S.C. § 1817(j)..... 20

12 U.S.C. § 1818(b)(6)..... 16

12 U.S.C. § 1828(j)(4)..... 19

12 U.S.C. § 1841..... 14

12 U.S.C. § 1844(c)..... 3,7,8

12 U.S.C. § 1847..... 24,25

12 U.S.C. § 1847(b)(2).....i,3,18

12 U.S.C. § 1847(b)(3)..... 4

12 U.S.C. § 1848..... 2

28 U.S.C. § 1254(1)..... 2

42 U.S.C. § 1320a-7a(c)..... 16

REGULATIONS CITED

12 C.F.R. § 225.5(c)..... 3,7

12 C.F.R. Part 363..... 26

Contents

Page

APPENDIX

P's A: Order and Judgment of Tenth Circuit, November 30, 1993..... 1a

P's B: Order denying rehearing, dated January 10, 1994.... 9a

P's C: CBC, Inc. v. Bd. Gov., 855 F.2d 688 (10th Cir., 1988), c.d. 489 U.S. 1096..... 11a

P's D: Stipulation of Facts, November 4, 1991..... 29a

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

CBC, INC.; LYNELL G. SKARDA; LANGDON L. SKARDA; AND KENT CARRUTHERS, Institution-Affiliated Parties of CBC, Inc.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals For the Tenth Circuit affirming the holding of the Board of Governors of the Federal Reserve System [Board] is not published but appears at P's Appendix A [P's 1a]. The instant

case is a sequel to CBC, Inc. v. Board of Governors of the Federal Reserve System, 855 F.2d 688 (10th Cir., 1988), c.d. 489 U.S. 1096, 109 S.Ct. 1568, 103 L.Ed.2d 934. P's Appendix C [P's 11a].

STATEMENT OF JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 30, 1993. The Order denying Petitioners' Petition for Rehearing with Suggestion for Rehearing En Banc was denied January 20, 1994. P's Appendix B [P's 9a]. [The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), 12 U.S.C. §1848, and 5 U.S.C. §702.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment to the Constitution that:

> "No person shall ... be deprived of ... property without due process of law."

12 U.S.C. §1847(b)(2) provides:

> "In determining the amount of the penalty the Board shall take into consideration the appropriateness of the penalty with respect to the size of financial resources and good faith of the company or person charged, the gravity of the violation, the history of the previous violations, and such other matters as justice may require."

12 U.S.C. §1844(c) provides:

> "The Board from time to time may require reports under oath .... The Board shall, as far as possible, use the reports of examinations made by ... Federal Deposit Insurance Corporation, or the appropriate State bank supervisory authority for the purposes of this section."

12 C.F.R. §225.5(c) provides:

> "...The Board will rely as far far as possible on the reports of examination made by the primary federal or state supervisor of the subsidiary bank of a bank holding company...."

STATEMENT OF THE CASE

The United States Court of Appeals for the Tenth Circuit had jurisdiction

to review the civil money penalties under 12 U.S.C. §§1847(b)(3), 1848 and 5 U.S.C. §702.

The facts are stipulated and so attached as P's Appendix D [P's 30a], without the 45 Exhibits in 2 volumes here unnecessary. Petitioners honestly feel that they are victims of two ill decided regulatory decisions and Tenth Circuit inattention to those decisions. It is hoped that Petitioners' questioning the denial of certiorari in CBC, Inc. v. Board of Governors, supra, is not taken by this Court to be improper as Petitioners recognize that such does not mean affirmance of what Petitioners believe to be an unjustified approval of the Board's overreaching by regulation in the face of a Congressional statute. That unjustified Tenth Circuit decision has resulted in these civil money penalties being assessed against Petitioners

which aggravates the prior plainly wrong Circuit conclusion. The results here are classic examples of why banks and BHCs believe that judicial disciplining of bank regulators has to be done by this Court or it will not be done at all.

The stipulated facts as shown by P's Appendix D are condensed as follows:

1. Petitioner, CBC, Inc. became a one-bank holding company owning all the stock of The Citizens Bank of Clovis in 1981. The other Petitioners are the 3 directors who own all of the stock of CBC, Inc. [BHC] and are the bank's and BHC's sole directors.

2. The Board's Form FR Y-6 had instructions therein, but no regulation, requiring BHCs with consolidated assets of $100 million to file comparative financial statements for the most recent 2 years certified by an independent

public accountant. The instructions provided for a waiver if the audit was an "undue burden or expense."

3. CBC, Inc. requested and received waivers of the audit provision for four (4) years and two (2) years additional have apparently been waived by the Board.

4. On May 8, 1984 CBC, Inc. asked for a permanent waiver which was denied by the Board's Regional Office, so CBC, Inc. petitioned the Board itself for such. When no answer had been received by August 23, 1984 CBC, Inc. concluded that the Board had consented sending it an order. The Board on September 25, 1984 issued its third waiver.

5. On October 11, 1985 the Board issued its fourth waiver advising that it was considering raising the audit threshold to $150 million, so on July 9, 1985 the

Board published its regulation notice for comment. CBC, Inc. submitted its Comment of 47 pages with 50 exhibits contending that 12 U.S.C. §1844(c) and the Board's regulation, 12 C.F.R. §225.5(c), required the Board to use the FDIC and State regulators reports of examination as certified audits were not reports by the BHC, and that there was no reason why $150 million and say $500 million should not be the threshold. Notwithstanding, the Board on December 15, 1985 adopted the $150 million threshold for comparative certified audits without the "undue burden and expense" in the old instructions.

6. On January 7, 1986 CBC, Inc. filed its Petition for Review in the Tenth Circuit. Oral argument in Denver, Colo. was heard on January 13, 1988. The Tenth Circuit's opinion was rendered some eight months later on August 30,

1988. This opinion ignored 12 U.S.C. §1844(c) on use of reports of examination, and added a point not raised by the Board that in 1956 when the BHC Act was passed, the word "report" meant "audit". Then on CBC, Inc.'s Motion for Rehearing it was shown that such synonymity did not arise until 1961, and that words in statutes take their meaning at time of passage, so that the meaning of the said statute could not be repealed by a change in dictionary meaning.

7. CBC, Inc. employed Price Waterhouse of Midland, Tex. to make a Report of Agreed - Upon Procedures for the bank on November 30, 1987 which was sent to the Board.

8. Grant Thornton of Midland, Tex., successor to Price Waterhouse, was retained by CBC, Inc. to make a Report of Agreed-Upon Procedures for the bank as of

December 31, 1988 which was sent to the Board.

9. Comparative statements were filed by CBC, Inc.'s in-house certified public accountant bank's Trust Officer and Vice President for all years until CBC, Inc. employed an independent accountant.

10. CBC, Inc. filed its Petition for Certiorari in this Court on January 3, 1989 which was denied March 27, 1989. A 1988 audit then was almost impossible.

11. On September 19, 1989 Boatright, Kelly & Co. of Amarillo, Tex. were employed to do the certified audit for 1989 and are presently doing it.

12. On March 29, 1990 CBC, Inc. filed its Form FR Y-6 with the certified audited statement for 1989 but not for 1988, but with a Report of Agreed-Upon Procedures for 1988 by Grant Thornton.

13. On June 21, 1990 the Board's

Dallas Office notified CBC, Inc. of possible civil penalties.

14. On September 24, 1990 a person from the Board's Dallas Office proposed civil money penalties of $10,000 against each of Petitioners.

15. A Notice of Assessment was received by Petitioners on April 13, 1991 for $10,000 each on CBC, Inc. and Lynell G. Skarda, and $5,000 each on Langdon L. Skarda and Kent Carruthers.

16. The Citizens Bank of Clovis, the lone subsidiary of CBC, Inc., was examined by its regulators as follows:

State & FDIC	July 30,1980
State & FDIC	November 13, 1981
State	November 30, 1982
FDIC	November 10, 1983
State	September 28, 1984
State	July 19, 1985
State	February 27, 1987
State & FDIC	July 22, 1988
State & FDIC	May 4, 1990

17. Petitioners' counsel argued this matter June 1, 1992 before the ALJ who happened to be the Chief ALJ

for the almost obsolete Interstate Commerce Commission. This resulted in Board's counsel writing almost the entire Decision and Recommended Order which is indicative of the consideration given by the ALJ. The Tenth Circuit in its opinion at Footnote 1 criticizes Petitioners' counsel for his remarks concerning this rubber-stamp procedure. In any reasonable fairness to counsel, such criticism of the truth is not merited.

18. The Tenth Circuit's opinion at the same footnote criticizes Petitioners' counsel for observing that nowhere in this mass of paperwork does the Board even offer an explanation of how it arrived at the amount of the penalties. Petitioners believe their comment was fair and applicable to the facts not justifying criticism.

19. This matter started in 1982. Twelve years later it reaches this Court hopefully for a decision in its entirety.

REASONS FOR GRANTING THE WRIT

This Court has no decisions regarding civil money penalties in the context of banking law and few on any aspect of the massive regulation of banks and their holding companies. What we in the banking industry call the "S&L syndrome" pervades both the judicial and regulatory attitude toward banks. That attitude has resulted in the unmerited conclusion that the regulators unerringly are right in all matters because they have a self-anointed unfettered discretion. That is a conclusion which is totally wrong on the law and the facts.

A. THE LOWER COURT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A

DEPARTURE BY THE BOARD AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION.

The opinion in the Tenth Circuit relies on Butz v. Glover Livestock Comm'n. Co., 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) which is a "public interest" statute regulating rates and operation of livestock and poultry markets under the Packers and Stockyards Act, 7 U.S.C. §181 et seq., providing for C&Ds and with a maximum penalty of $10,000 where the Secretary of Agriculture "shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue business". Id. §193(b). The operator there had been warned of a possible C&D several times but persisted in incorrect weighing of livestock and making false entries of weights thereby cheating for profit. The facts support

the decision. The result was a 20-day suspension, which was eliminated by the lower court, also the Tenth Circuit, but restored by this Court. Maybe that is why the Tenth Circuit is gun-shy.

In addition to the dissimilarity in facts and law in the instant case, the Bank Holding Company Act (BHCA), 12 U.S.C. §1841 et seq., that controls this case is not a "public interest" statute as was held in Board of Governors of the Federal Reserve System v. Dimension Financial System, 474 U.S. 361, 106 S.Ct.681, 88 L.Ed.2d 691 (1986) affirming the Tenth Circuit in 744 F.2d 1402 1408 (1984). Thus, the Board simply does not have that discretion given to agencies with "public interest" or "as public convenience, interest, or necessity require", or "unjust, unreasonably discriminatory" powers provisions such as the F.C.C., I.C.C.,

E.P.A., or the N.E.R.C. which has the powers of the old F.P.C., and the Secretary of Agriculture under the Packers and Stockyards Act as in Butz, supra, which case involved cheating for profit.

The Tenth Circuit further cites in support its own decision in Chapman v. U.S., 821 F.2d 523 (10th Cir., 1987), which was an aggravated case of nursing home owner filing false claims under the Civil Money Penalties Law of the Social Security Act providing for penalties of $2,000 per claim and double the amount claimed. Chapman was convicted in State court and fined. His defense was that the actual loss was some $21,115 rather than the $118,136 assessed. That court admitted that the statute was criminal rather than civil in nature designed to deter false or improper claims and to reimburse the government for hard-to-

prove damages. The statute 42 U.S.C. §1320a-7a(c) required the Secretary to take into account the circumstances, degree of culpability, prior offenses, financial condition, and other matters that justice may require. There were 19 false claims of $118,136 and a State claim of $21,115 over a year period. This case does not even remotely analogize to the instant case either in statutory purpose or fact. That case also is a case of cheating for money.

The third supposed authority by the Tenth Circuit is Akin v. Office of Thrift Supervision, 950 F.2d 1180 (5th Cir., 1992), concerning three C&Ds on a contract to reimburse a savings and loan for $19 million of capital deficiencies. This is an "unsafe or unsound" case 12 U.S.C. §1818(b)(6) for creating more than a nominal loss to the savings and loan. It too is a case of cheating on

a contract for money.

The illogical concept that all statutes providing for civil money penalties give an agency plenary power to do as it pleases is comparing apples with oranges. The statutes' purpose and damage to the government or others is central to a determination as to whether a civil money penalty is an abuse of discretion of varying degrees or arbitrary, capricious, without a sensible justification in fact or unwarranted in law. The circuit courts have so cited CMP cases like this for years. This Court is the only one that can get them back on track.

For any court to conclude that a civil money penalty is appropriate where the failure hurt no one, caused no monetary loss to any one, nor any danger to the BHC or bank demonstrates judgment so far from accepted and usual course of

judicial proceedings as to deserve this Court's power of supervision. It tells the world that a BHC or a bank is forbidden to litigate the validity of an agency's regulation. Such a prohibition is a lack of due process which neither the Congress nor the Constitution could have intended. It conflicts with the due process provision of the Fifth Amendment. It is aggravated by the fact that Petitioners still think their grounds for nullifying the regulation were sound in all respects. The Tenth Circuit did not even discuss the provisions of 12 U.S.C. §1847(b)(2) as to what should be considered in determining the lawfulness of a civil money penalty. This kind of treatment is a further act contrary to the Fifth Amendment. De mimimis failures cannot constitutionally be the foundation for civil money penalties.

B. CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

The recent cases on bank regulation indicate that some circuits are taking a hard look at bank regulators' alleged discretion.

In Dazzio v. FDIC, 970 F.2d 71 (5th Cir., 1992), the charge was violating insider loan limits as an unsafe or unsound practice where the FDIC increased the CMP from $125,000 to $175,000 on remand. The statute, 12 U.S.C.§1828(j)(4), provided "That the corporation may, in its discretion..." modify any civil money penalty. In admonishing the FDIC for increasing the CMP the Court said:

> "In analyzing the tone and argument in both decisions of the Board, we regretfully cannot escape the impression that the Board has inappropriately blurred the line between adversary and adjudicator."

So be it here.

In Oberstar v. FDIC, 987 F.2d 494 (8th Cir., 1993) the charge was violating the Change in Bank Control Act of 1978, 12 U.S.C. §1817(j), involving the use of a proxy in a bank under a C&D resulting in a $125,000 CMP. The statute there, 12 U.S.C. §1817(j)(15)(B) states: "Whenever it appears to the appropriate Federal banking agency that any person is violating...any provision...or any regulation...." a CMP could result. After Oberstar appealed, the FDIC increased the penalty, which the court concluded was to punish Oberstar because he appealed, just as the Board is punishing Petitioners here. In commenting on this increase the court at p.503, Footnote 8, said:

> "We are concerned that this was not an isolated occurrence. See Dazzio v. FDIC, 970 F.2d 71, 79 (5th Cir., 1992) (increased penalty after judicial remand 'looks to us uncomfortably like judicial vindictiveness'),"

Oberstar was 22 days late in filing his answer, so the FDIC defaulted him on the CMP, but the court reversed such.

The court in Oberstar, supra, p.502, called the use of the proxy at most "a technical violation of the Control Act" a "benign use" not being an unsafe or unsound practice. Such it is here.

In Amberg v. FDIC, 934 F.2d 681 (5th Cir., 1991) CMPs on several directors of a small bank were defaulted on a late answer. The court reversed holding that the default was arbitrary and remanded for a hearing.

The only judicial statement bearing on "gravity of the violation" is in Central Bank of Matoon v. U.S. Dept of the Treasury, 912 F.2d 897 (7th Cir., 1990), where Judge Richard A. Posner in affirming revocation of trust powers of a small national bank subject to a C&D

stated:

> "The improprieties range in gravity from the technical (failure to comply with certain reporting requirements) through the mild (minor violations of the terms of trust instruments)...."
> ...Even if the sanction is not so fell as the bank contends, it might still be disproportionate to the gravity of the wrong-doing." (Emphasis writer's).

The failure to have an audit cannot be more than a technical failure as nothing was hurt.

In Anonymous v. FDIC, 617 F.Supp. 509 (D.C., D.C., 1985), the agency started a proceeding to remove an officer and director of several small banks and prohibit him from participating in the affairs of any insured bank. Under the old statute, the officer brought a suit to stay the interim order of suspension. The FDIC pleading was general in using statutory language without explaining the basis for its

determination just as in the instant case. Judge Harold H. Greene wrote a memorable quote in saying:

> "It will not do to insist, as the FDIC does, that the statute simply commits interim stay decisions to the agency's unfettered discretion, which is exercised on the basis of the FDIC's banking expertise. If that were so, judicial review under 12 U.S.C. §1818(f) would be little more than a formalistic exercise in which the reviewing court would simply determine that the FDIC had properly performed the ministerial tasks of issuing the required notices and defer to the FDIC's discretionary decision to issue the interim suspension order."

The Board and the lower court have both failed to set out just how the lack of a useless audit of a small BHC can become a grave violation when such was effectively waived six times while the basic legality of the requirement was being litigated in obvious good faith by Petitioners who had no history

of previous violations. The only reason for CMPs is to deter questioning the Board's regulations. There is no other matter to consider. With all of this lengthy litigation, Petitioners have spent far more litigating than they would have spent had they complied. Any imagined economic gain to Petitioners is not a statutory issue anyhow under 12 U.S.C. §1847. This did not change until FIRREA was adopted in 1989. Two wrongs by the lower court do not make a right.

This is a true example of arbitrary and capricious action by the Board which is contrary to law and not supported by substantial evidence. The Board's alleged discretion needs to be reined in. The Board has no more discretion than the run-of-the-mill administrative agency. The Board must be made to satisfy the statutory requirements for

assessing any CMP. This it has not done and cannot do.

C. BANK REGULATORS USE OF CIVIL MONEY PENALTIES REQUIRES JUDICIAL GUIDELINES.

The enormous increase in CMPs from $1,000 per day in 12 U.S.C. §1847 to FIRREA's $2,000 per day to a maximum of $1,000,000 or 1% of assets in the current 12 U.S.C. §1847(d) is indicative of the regulator's potential for excessive if not ruinous use of CMPs. Without judicial guidelines to this use, the regulators have, as here, and will impose such CMPs regardless of lack of scienter of the BHC or bank or its effect as an unsafe or unsound practice.

CONCLUSION

This case meets every criteria of S.Ct. Rule 10 for grant of certiorari to a Federal court. There is a pressing need for this Court to adjudicate guide-

lines for the imposition of civil money penalties. Banking regulators feel the power of recent legislation. They are running rampant to say the least.

The most remarkable thing about the Board' unreasonableness in setting the $150 million consolidated assets threshold for the audit is what happened as a result of FDICIA which required the FDIC to determine when banks or their BHCs should have an audit committee. After mulling the matter over for 1.5 years the FDIC set that threshold at $500 million in 12 C.F.R. Part 363 on June 2, 1993. This applies to banks that are members of the Federal Reserve too. The bank regulators should get their act together.

The massive failure of the Board and the Tenth Circuit to follow the basics of the Administrative Procedure Act alone merits grant of the writ. Con-

flicting decisions, departures from the accepted and usual course of judicial decisions, and the important question of civil money penalties in banking under these benign circumstances where no one or anything has been hurt, desperately need guidance from this Court. This Court should respond by granting the writ or in the alternative, little used but available, remand the case to the Tenth Circuit for compliance with the law.

Respectfully submitted,

Lynell G. Skarda
P. O. Box 400
Clovis, N.M. 88101
505/762-9163
Counsel for Petitioners
and Pro Se

APPENDIX A - JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED NOVEMBER 30, 1993

No. 92-9572
(On Petition for Review of an Order of the Board of Governors of the Federal Reserve System)

CBC, INC.; LYNELL G. SKARDA, LANGDON L. SKARDA, KENT CARRUTHERS, Institution-Affiliated Parties of CBC, Inc .,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR AND MOORE, Circuit Judges.

Petitioners, CBC, Inc., a one-bank holding company, and CBC officers-

---

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrine of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

directors Lynell G. Skarda, Langdon L. Skarda, and Kent Carruthers, appeal the assessment of penalties by the Board of Governors of the Federal Reserve System (Board). The Board imposed the penalties against CBC and its officers and directors for failure to comply with a Board reporting requirement of filing a certified financial report for the year 1988. Petitioners unsuccessfully challenged the validity of this reporting requirement in CBC, Inc. v. Board of Governors of the Federal Reserve System, 855 F.2d 688 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989). After our decision in that appeal, petitioners continued in noncompliance with the reporting requirement, and the Board issued notices of assessment of civil money penalties of $10,000 each against CBC and Lynell Skarda, and $5000 each against Langdon Skarda and Kent

Carruthers. An administrative law judge heard oral arguments and recommended the penalties be assessed. The Board adopted the ALJ's opinion and assessed the recommended penalties. The instant appeal is from that order.

Petitioners raise three arguments that we think are worthy of response.[1] First they ask us to reconsider our decision in CBC, Inc., 855 F.2d at 688. A panel of this court is bound by a prior decision of another panel and only the in banc court can overturn the earlier decision. We note that in banc review was denied in the earlier case, and the United States Supreme Court denied certiorari.

---

[1] We strongly disapprove of the unprofessional comments included in Petitioners' Brief in Chief, e.g., at pages 5 and 15. Such "arguments" have no place in an appellate brief and are especially unseemly coming from a lawyer who clerked for a judge of this circuit. See II R. tab 41 at 37.

Appendix A

The prior decision stands as law of the case and res judicata on the issues petitioners ask us to reconsider; it affirms the power of the Board to issue the regulation and to order the compliance complained of in this appeal.

Petitioners next urge that there is no factual or legal basis for the imposition of penalties against them under the circumstances of this case. They make only two arguments here that we deem worthy of noting. Petitioners argue that the Board should be estopped from asserting penalties because the Board waived the certification requirement for earlier years to which the bank was subject. "It is unclear whether estoppel can even be invoked against the government." Muck v. United States, 3 F.3d 1378, 1382, (10th Cir. 1993). Although the Supreme Court has implied there may be a case in which

estoppel might be used against the government, see Heckler v. Community Health Services, 467 U.S. 51, 60-61 (1984), this is not such a case.

Parties asserting estoppel must show, inter alia, that they reasonably relied on "a definite misrepresentation of fact" by the party to be estopped. Heckler, 467 U.S. at 59 (quoting Restatement (Second) of Torts § 894(1) (1979). In the instant case, the Board made no misrepresentation of fact that the Board would waive the certification requirement in 1988. Each waiver of the certificate requirements pursuant to petitioners' express request was limited to a particular year and specifically stated that such waiver did not waive filing in the future. See I R. doc. 26, ¶¶ 8, 14, 16. Petitioner's estoppel argument is not well taken.

Appendix A

Petitioners also assert that they had no obligation to file a certified financial report as long as they were litigating the validity of the requirement through the Supreme Court's denial of certiorari in 1989. With respect to this argument we note that this court affirmed the power of the Board of Governors by a decision dated August 30, 1988, during the 1988 year at issue. See CBC, Inc., 855 F.2d at 688. No stay of that decision was obtained by petitioners. The case stood as law binding upon the petitioners unless reversed by the Supreme Court. By its denial of certiorari the Supreme Court allowed our ruling to stand. Petitioners have no excuse for the admitted failure to file.

Finally, petitioners argue that the monetary penalties imposed upon them are arbitrary, capricious, and an abuse of

discretion in violation of 12 U.S.C. § 1847(b)(2) as it read before a 1989 amendment. In reviewing the reasonableness of penalties assessed by regulatory agencies, courts must give considerable deference to agency determinations. See Akin v. Office of Thrift Supervision, 950 F.2d 1180, 1183 (5th Cir. 1992). We will not disturb the penalties ordered unless we find they are "unwarranted in law or without justification in fact." Chapman v. United States Dep't of Health and Human Servs., 821 F.2d 523, 529 (10th Cir. 1987) (citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185-86 (1973)).

We have no difficulty affirming the Board's action assessing these penalties. Under the statute as it then existed petitioners were subject to fines of up to

$1000 per day.[2] The penalties assessed are modest when compared to the cost of the audit required by the FR Y-6 Form. The Board was entitled to levy penalties sufficient to capture petitioners' attention and to insure compliance in future years.

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge

---

[2] These amounts have been increased by legislation applicable to conduct engaged in after August 1989 to $20,000 per day for intentional failure to report. 12 U.S.C. § 1847(d)'2).

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 20, 1994

No. 92-9572

CBC, INC.; LYNELL G. SKARDA, LANGDON L. SKARDA, KENT CARRUTHERS, Institution-Affiliated Parties of CBC, Inc.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

ORDER
Entered January 20, 1994

Before SEYMOUR, Chief Judge, and LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of petitioners' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Appendix B

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

Patrick Fisher
Chief Deputy Clerk

APPENDIX C - ON PETITION FOR REVIEW OF A REGULATION OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Federal Reserve System No. R-0548) IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED AUGUST 30, 1988

No. 86-1001

CBC, INC., a corporation,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

ON PETITION FOR REVIEW OF A REGULATION OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Federal Reserve System No. R-0548)

Lynell G. Skarda, of Clovis, New Mexico, for the Petitioner-Appellant.

Robert D. McGillicuddy (Richard K. Willard, Assistant Attorney General, Michael Bradfield, General Counsel, and Richard M. Ashton, Associate General Counsel, with him on the brief), Attorney, Board of Governors of the Federal Reserve System, for the Respondent-Appellee.

Before **McKAY, BARRETT**, and **TACHA**, Circuit Judges.

TACHA, Circuit Judge.

Appendix C

Petitioner CBC, Inc. (CBC) challenges the authority of the Board of Governors of the Federal Reserve Board (Board) to require that certain bank holding companies submit consolidated financial statements that are certified by an independent auditor. CBC also contends that there is no rational basis for the Board's establishment of a 150 million dollar threshold for the consolidated reporting requirement. We affirm.

I.

CBC is a one-bank holding company with assets exceeding 150 million dollars. It owns all of the stock of the Citizens Bank of Clovis (Bank). The bank is a New Mexico state bank and is examined by both the Federal Deposit Insurance Corporation and the Director of Financial Institutions of the State of New Mexico. CBC's challenge to the Board's regulatory action is

two-pronged. First, it argues that the Board lacks authority to require any bank holding company to submit the independently certified financial statements. Second, CBC contends that the reporting requirement is invalid because it requires audits of the bank holding companies' subsidiary banks, over which the Board has no authority.

The Bank Holding Company Act, 12 U.S.C. § 1841 et. seq., "vests broad regulatory authority in the Board over bank holding companies 'to restrain the undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit.'" Board of Governors v. Dimension Fin. Corp., 106 S.Ct. 681, 684 (1986), (quoting S. Rep. No. 91-1084, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 5519, 5541). The

Appendix C

Board has authority under the statute "to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes" of the Act. 12 U.S.C. § 1844(b). The Board may also "require reports under oath to keep it informed" regarding compliance with the Act and the Board's duly promulgated regulations. 12 U.S.C. § 1844(c). Board regulations promulgated pursuant to the Act state that holding companies "shall furnish, in the manner and form prescribed by the Board," annual operation reports and any other information and reports the Board requires. 12 C.F.R. § 225.5(b).

In 1985, the Board revised several of its reporting requirements. The revision challenged here changed the information to be reported in Agency Form number FR Y-6. This form, which was adopted on December

15, 1985 after appropriate notice and comment, required that bank holding companies with consolidated assets of 150 million dollars or more submit consolidated financial reports certified by an independent public accountant. Bank Holding Company Reporting Requirements, 50 Fed. Reg. 50,951 (1985). CBC contends that the Board has no authority under the Act to require such reports from bank holding companies. We disagree.

The Act gives the Board authority to "require reports under oath to keep it informed" as to whether the Act and regulations have been complied with. 12 U.S.C. § 1844(c). The Act does not define "reports," nor does the statute limit the types of reports the Board could require. Thus, we must decide whether consolidated financial statements certified by an independent public

accountant fall within the scope of "reports" authorized by the Act.

The Board is the agency charged by Congress with administering the Act. 12 U.S.C. § 1844(b). When the Board interprets the Act through its rulemaking authority we must give substantial deference to the Board's interpretation if it "provides a reasonable construction of the statutory language and is consistent with legislative intent." Securities Industry Ass'n v. Board of Governors, 468 U.S. 207, 217 (1984).

We hold that the Board's independent certification requirement derives from a reasonable construction of the statutory language. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin

Appendix C

v. United States, 444 U.S. 37, 42 (1979); Colorado High School Activities Ass'n v. NFL, 711 F.2d 943 (10th Cir. 1981). A "report" is defined as "something that gives information" or a "formal account of the results of an investigation by a person or group authorized or delegated to make the investigation (an audit)." Webster's Third New International Unabridged Dictionary at 1925 (1981). Thus, if the word "report" is given its common meaning, the Board's new reporting requirement seems clearly to fall within the statutory authority. Independently certified financial statements provide the Board with information that is qualitatively different from that provided in uncertified financial statements, in a reporting format that may differ from those required by other regulatory agencies. The certification provides

the Board with an increased measure of reliability regarding the financial statements. The bank objects to the certification requirement because it requires an audit. The auditing process makes possible the report and certification by the accountant. The resulting documentation is a report. We decline to characterize the requirement of submitting financial statements certified by an independent accountant as anything other than the kind of informative and reliable report envisioned by Congress and authorized by the Act. We will not substitute our judgment with respect to the kinds of reports the Board requires where the choice of the Board is clearly reasonable in light of the language of the Act and the intent of Congress in passing the Act.

Having concluded that the Board's reporting requirement falls within the

ambit of the statute's plain meaning, we will uphold it unless there is "a clearly expressed legislative intent to the contrary." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Colorado High School Activites [sic] Ass'n, 711 F.2d at 945. In this case we find not only that there is a lack of clear legislative intent to contravene the plain meaning of the word "reports," but that the purposes enunciated in the Act's legislative history support the Board's interpretation of that term.

One of the purposes enunciated in the Act's legislative history and evident throughout the Act, is "to prevent possible abuses related to the control of commercial credit." S. Rep. No. 91-1084, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code and Admin. News 5519, 5541. The

broad authority that section 1844(c) grants the Board to require reports is a necessary predicate to enhance the Board's ability to carry out this purpose. The Board is better able to detect abuses related to the control of commercial credit if it can require informative and reliable reports. The word "reports" as used in this Act must be broad enough to encompass reliable documentary evidence of the commercial credit practices and the financial positions of bank holding companies and their subsidiaries. Unless the language is so construed, the Board will be hampered in its attempt to carry out one of its principal responsibilities under the Act.

We cannot say that the Board's interpretation is unreasonable. In its justification of the FR Y-6 reporting requirements the Board states:

Appendix C

> The FR Y-6 is the primary source for much of the financial and structural data on individual bank holding companies, their banking and nonbank subsidiaries and other regulated investments. The information enables the Federal Reserve to (1) monitor holding company operations and to insure that the operations are conducted in a safe and sound manner that protects the depositors of the subsidiary banks; and (2) determine holding company compliance with the prohibitions of the Bank Holding Company Act and Regulation.

50 Fed. Reg. 28,026, 28,027 (1985).

This justification is consistent with the purposes for which Congress empowered the Board to require reports in meeting its responsibilities under the Act. We uphold the Board's decision to require certain bank holding companies to submit consolidated and independently verified financial statements.

In order to satisfy the Board's new reporting requirement, the subsidiary banks owned by affected bank holding

Appendix C

companies will have to be audited. CBC argues that the Board has no such authority over the banking subsidiaries. Apparently, CBC contends that because other agencies have regulatory authority over the banking subsidiaries, the Board lacks jurisdiction to require independent audits.

The Act refutes this argument on its face. Section 1844(c) allows the Board to "require reports under oath to keep it informed." This reporting authorization is limited only by the purposes of this Act. Section 1841(a) gives the Board jurisdiction over "any company which has control over any bank." In order to give effect to the purposes of the Act, the Board must be permitted to require reports from the banks owned by bank holding companies.

Appendix C

In requiring such reports the statute provides that "[t]he Board shall, as far as possible, use the reports of examinations made by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the appropriate State bank supervisory authority." 12 U.S.C. § 1844(c) (emphasis added). CBC argues that this section requires the Board to use such reports to the exclusion of Board-instituted reporting mechanisms.

This language cannot be read so narrowly. The phrase "as far as possible" must be read in conjunction with the broad authority to require reports conferred on the Board in the same section of the statute. In our view, this section requires the Board to use other agencies' reports to the extent that those reports provide the same information, with similar assurances of reliability, and in the same

timely manner as a certified financial report from an independent accountant. CBC argues that reports based upon FDIC examinations provide the same reliable and timely information as the independent auditor's certified report. Even if we were to assume that the examination methods of FDIC examiners and independent accountants produce reports of comparable reliability, the record shows that complete FDIC examinations are not done on an annual basis at some institutions. The FDIC Manual of Examination Policies permits highly rated institutions such as CBC to go without a complete examination for up to thirty-six months. Audits by independent accountants, on the other hand, are consistently performed on an annual basis in order to produce the annual certified report the Board requires on form FR Y-6.

Appendix C

CBC contends that the timeliness problem with reports based on these FDIC examinations can be solved by updating them. However, the methods used to update such reports, including visitations by FDIC examiners and off-site reviews of financial information, can be far less complete than a full FDIC examination. It would not be unreasonable for the Board to conclude that the qualitative differences between a certified financial report based upon a complete annual audit and a FDIC report updated by procedures which are less thorough than a complete examination, make it impossible to obtain the same reliable information from the FDIC reports.

CBC has failed to show that it is possible to get the same reliable, timely financial information from FDIC reports, and it has failed to produce evidence of

reports of other agencies which would meet these requirements. Therefore, we cannot conclude that the Board's requirement of certified financial statements from an independent accountant contravenes the statutory requirement to utilize regulatory agencies' reports where possible. The Board has acted within its authority granted by Congress, and without proof to the contrary, we will not substitute our judgment regarding the kind of information required by the Board to fulfill its statutory responsibilities.

II.

CBC also challenges the threshold established by the Board for the applicability of the reporting requirement. Before the 1985 revision, bank holding companies with banking assets exceeding 100 million dollars had to submit consolidated financial statements. Under the

revised regulations, those reporting requirements apply to bank holding companies with consolidated assets exceeding 150 million dollars. CBC argues that there is no rational basis for either threshold.

The Act gives the Board discretion in implementing its reporting requirements. Section 1844(c) states that the "Board may require reports under oath." (Emphasis added.) This discretionary language implicitly authorizes the Board to make reasoned judgments about the kinds of reports it will require and about the bank holding companies from which it will require them. If there is a rational basis for the Board's determinations, see Wyoming Hospital Ass'n v. Harris, 77 F.2d 936 (10th Cir. 1984), we cannot say that the Board has acted arbitrarily and capriciously.

Appendix C

The Board is uniquely qualified to determine the point when the size of a bank holding company requires the imposition of more stringent reporting requirements in order to administer the statute effectively.

We hold that the Board acted within its statutory authority in requiring from bank holding companies consolidated financial statements that are independently certified, and in establishing a 150 million dollar threshold for the reporting requirement to attach.

AFFIRMED.

**APPENDIX D - STIPULATION OF FACTS
UNITED STATES OF AMERICA BEFORE
THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.**

In the Matter of

CBC, INC.,
Clovis, New Mexico

Docket No. 90-033-CMP-BHC

In the Matter of

LYNELL G. SKARDA,
An Institution - Affiliated
Party of
CBC, Inc.,
Clovis, New Mexico

Docket No. 90-033-CMP-I1

In the Matter of

LANGDON L. SKARDA,
An Institution - Affiliated
Party of
CBC, Inc.,
Clovis, New Mexico

Docket No. 90-033-CMP-I2

In the Matter of

KENT CARRUTHERS,
An Institution - Affiliated
Party of
CBC, Inc.,
Clovis, New Mexico

Docket No. 90-033-CMP-I3

Appendix D

STIPULATION OF FACTS

It is hereby stipulated and agreed among the parties hereto, by their respective attorneys duly authorized and Lynell G. Skarda, *pro se* and as attorney-in-fact for respondents, that the following are the facts that would be produced at trial, and that such facts may be read and used in evidence at the trial of this case as follows:

1. The Citizens Bank of Clovis (the "Bank") is a state bank chartered in 1916 by the State of New Mexico that is not a member of the Federal Reserve System. Since 1968, Lynell G. Skarda has been Chairman of the Bank's board of directors and Langdon L. Skarda Secretary of the Bank's board of Directors. Prior to that time, both Lynell and Langdon Skarda had been directors of the Bank for

many years. T. E. Willmon, Jr. was President of the Bank and a director from 1967 until his retirement on January 31, 1986, and was succeeded by Kent Carruthers, the current President of the Bank and a Director. The Bank has only three (3) directors.

2. CBC, Inc. ("CBC") was incorporated in New Mexico on September 23, 1981 and filed a preliminary application for approval to become a bank holding company with the Board of Governors of the Federal Reserve System (the "Board") on September 11, 1981. It is a one-bank holding company.

3. On September 30, 1981, the Bank had Total Assets of $107,638,000, Deposits of $97,288,000, Total Equity Capital of $7,904,000, and Allowance for Loan Losses of $512,000. On the

most recent call, March 31, 1991, the Bank had Total Assets of $162,185,000, Deposits of $143,130,000, Total Equity Capital of $18,055,000, and Allowance for Loan Losses of $2,197,000. Exhibits 1 and 2 attached.

4. From 1981 through 1985, the consolidated assets of CBC and the Bank were not less than $100 million. From January 1, 1986 to present, the consolidated assets of CBC and the Bank were not less than $150 million.

5. On December 31, 1981, CBC's application to be a bank holding company was approved by the Federal Reserve Bank of Dallas under authority delegated by the Board. Lynell G. Skarda became Secretary of CBC, Langdon L. Skarda became Vice-President of CBC, and T. E. Willmon, Jr. became Presi-

dent of CBC. Willmon was succeeded by Kent Carruthers as President of CBC on January 31, 1986. Exhibit 3 attached. Since that time, CBC has at all pertinent times been a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1847, (the "BHC Act").

6. CBC owns all of the stock of the Bank. Lynell G. Skarda is the controlling stockholder of CBC. The Bank is the sole subsidiary of CBC.

7. The instructions on Federal Reserve Form FR Y-6, which implements the Board's authority under section 5 of the BHC Act and the Board's Regulation Y, 12 C.F.R. § 225 et seq., require bank holding companies to file an annual report of the company's operation on Form FR Y-6 with

the Reserve Bank within three months of the end of the company's fiscal year. In accordance with Regulation Y, the FR Y-6 Form has a specific format and instructions which must be followed. The instructions on the FR Y-6 Form currently require each bank holding company with consolidated assets of $150 million or more to submit the company's two most recent comparative financial statements, both consolidated and parent only. The consolidated financial statements must be certified by an independent public accountant and should be prepared in accordance with generally accepted accounting principles. In 1982, the instructions for filing the report provided that "Where completion of the requested information or strict compliance with the

Appendix D

requirements of the Y-6 report involves *undue burden or expense* to the bank holding company, the Board may, upon receipt of a written request--submitted through the Federal Reserve bank prior to the filing of the Y-6 report--permit the substitution of appropriate information." Exhibit 5 (emphasis in original).

On February 28, 1983, CBC requested by letter to the Dallas Federal Reserve Bank (Exhibit 4) an exemption from the Federal Reserve requirement that the consolidated and parent only bank holding company statements must be certified by an independent public accountant if the total assets of the bank holding company's subsidiaries are $100,000,000 or more. The letter

stated that the requirement of certification by an independent public accountant constituted an "undue burden or expense" and requested that CBC be allowed to substitute "appropriate information".

8. On March 18, 1983, the Federal Reserve Bank of Dallas, in view of the fact that the filing deadline for the 1982 Y-6 report was approaching, granted CBC a waiver of the certified audit requirement for the year 1982, CBC's first filing year. Exhibit 6 attached. The Reserve bank advised that the waiver was applicable only to 1982 and that a decision regarding the certification requirement for future reports would be forthcoming. Exhibit 6.

9. The 1982 comparative unaudited

accounting statements for CBC were filed with the Dallas Reserve Bank on March 31, 1983. Exhibit 7. These and subsequent unaudited statements prior to the employment of Boatright, Kelly and Company were prepared by Jeff Jacobs, a Vice President and Senior Trust Officer of the bank who has been a Certified Public Accountant since February 5, 1962, and an officer of the bank since February 18, 1975.

10. The Dallas Reserve Bank denied CBC's request for a permanent waiver of the certified audit requirement in a letter to CBC dated May 4, 1984. Exhibit 4. The letter stated that "Although it is recognized that there are a few closely owned bank holding companies with assets of $100 million for which an independent audit is not

necessary to assure disclosure of financial affairs to the stockholders, that it is not the purpose of these statements. The requirement ... is viewed as necessary for the Federal Reserve to discharge its supervisory responsibility." Because of the Federal Reserve's delay in responding to the request, however, the Reserve Bank granted CBC a waiver of the certification requirement for the 1983 FR Y-6 report. Exhibit 8.

11. On May 8, 1984, CBC filed with the Board a petition for review of the Reserve Bank's action in denying the requested permanent waiver pursuant to the Board's regulations for review of delegated action. Exhibits 9-10. See 12 C.F.R. § 265.3.

12. On August 23, 1984, CBC having heard

nothing from its Petition for Review of the denial by the Dallas Reserve Bank, concluded that the Board had acquiesced in CBC's request for a waiver of the certified audit requirement and sent the Board copies of an order to that effect and otherwise requesting the opportunity to present evidence in order to make a record for judicial review. Exhibits 11 and 12.

13. On September 17, 1984, CBC again requested a waiver of the certified audit requirement from the Dallas Reserve Bank because the Board had not yet resolved CBC's petition. See Exhibit 12.

14. On September 26, 1984, the Dallas Reserve Bank sent CBC a letter acknowledging receipt of CBC's petition for review by the Board,

and stating: "In view of the fact that CBC's fiscal year end is approaching and it would be difficult at this time to engage an independent auditing firm to prepare such statements and meet the March 31, 1985, filing deadline, this Reserve Bank, acting on behalf of the Board of Governors, hereby waives the certification requirement for the 1984 F.R. Y-6. Please be advised that this waiver applies to the 1984 report only and a decision regarding future reports is forthcoming." Exhibit 13. Lynell G. Skarda then filed a request with the Federal Deposit Insurance Corporation ("FDIC") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, concerning information regarding FDIC audit procedures of banks

with assets of more than $100 million. Exhibit 13A hereto attached. A FOIA request regarding the certification requirement for Y-6 reports and the possibility of waivers was filed with the Board on October 29, 1984. Exhibit 13B. On October 30, 1984, Lynell G. Skarda sent a letter summarizing these requests to Roberta M. Killgore, a Board Legal Division attorney. Exhibit 13C.

15. On February 12, 1985, CBC filed its 1984 FR Y-6, which was prepared pursuant to the waiver of the certification required for the 1984 fiscal year referenced in paragraph 14. Exhibit 14.

16. By letter to Lynell G. Skarda on October 11, 1985, the Dallas Reserve Bank granted CBC a waiver of the

certification requirement for the 1985 F.R. Y-6 on the ground that the Board was then considering a proposal to raise the minimum asset threshold for the certification requirement to $150 million. The letter also advised that the waiver concerned only the 1985 fiscal year and that a new waiver request would be required for any future years. Exhibit 15.

17. On July 9, 1985, the Board published in the Federal Register its proposed revisions to certain agency forms, including the FR Y-6. "Proposed Bank Holding Company Reporting Requirements" 50 Fed. Reg. 28026 (July 9, 1985). The proposed revisions included raising the minimum size of bank holding companies subject to the certification requirement from $100 million in subsidiary bank assets to

$150 million in consolidated bank holding company assets. The reason given for the revision was that the higher threshold would reduce the burden on companies with between $100 million and $150 million in assets. No further reason was stated as to why the $150 million figure was proposed as the new threshold. Nor did the proposal address the reasons why certification requirements had been imposed in the first place in light of the availability to the Board of examination and inspection reports. Exhibit 16.

18. On July 30, 1985, CBC submitted its comment on the proposed revisions, consisting of 47 pages of text with 50 exhibits containing 167 pages. Exhibit 17.

19. On October 8, 1985, Lynell G. Skarda

wrote Stephen Lovette, Supervising Financial Analyst for the Board, regarding the use of CAMEL ratings as a factor in determining the necessity for a certified audit. Exhibit 18.

20. On December 13, 1985, after an opportunity for public comment, the Board gave notice of its final approval of the revisions to the FR Y-6 Form as proposed. 50 Fed. Reg. 50956 (December 13, 1985). The Federal Register preamble noted that comments as to the raised threshold for the certification requirement were mixed, with some commenters questioning the usefulness of having an external audit and others favoring the requirement. The preamble noted that one commenter had questioned the Board's legal authority for requiring the submission of such statements.

Appendix D

Exhibit 19.

21. The current instructions for FR Y-6 no longer contain the provision for waiver of the certification requirement on grounds of "undue burden or expense" as they previously did. Compare Exhibit 5 with Exhibit 20.

22. On January 7, 1986, CBC filed its Petition For Review in the United States Court of Appeals for the Tenth Circuit, Docket No. 86-1001. Exhibit 21. Subsequently, CBC filed its Brief-in-Chief, Exhibit 22, and the Board filed its Brief for Respondent, Exhibit 23, and CBC filed its Reply Brief, Exhibit 24. CBC's request to the Board for a stay pending appellate review, Exhibit 25, was denied March 23, 1987. Exhibit 26.

23. On January 13, 1988, the Petition For Review was argued in the Tenth Cir-

cuit at Denver, Colorado, before Judges McKay, Barrett, and Tacha.

24. On August 30, 1988, the Tenth Circuit affirmed the Board in an opinion by Judge Tacha. The opinion is attached to Exhibit 27 and reported at 855 F.2d 688.

25. On September 26, 1988, CBC filed its Petition For Rehearing And For Rehearing En Banc. Exhibit 27.

26. On October 25, 1988, the Tenth Circuit denied CBC, Inc.'s Petition For Rehearing, etc. Exhibit 28.

27. On January 3, 1989, CBC, Inc. filed its Petition for Certiorari in the United States Supreme Court and the Board responded. Exhibits 29 and 29A. CBC did not seek a stay of the mandate of the Court of Appeals pending review by the Supreme Court.

28. On March 27, 1989, the Supreme Court

denied certiorari. Exhibit 30.

29. The Bank retained Price Waterhouse of Midland, Texas, to make a Report on Agreed-Upon Procedures for the Bank as of November 30, 1987. Exhibit 31.

30. The Bank retained Grant Thornton of Midland, Texas, the successor to the Midland office of Price Waterhouse, to make a Report of Agreed-Upon Procedures as of December 31, 1988. Exhibit 32.

31. On March 21, 1989, before the denial of certiorari on March 27, 1989, Lynell G. .Skarda signed CBC's FR Y-6 Form for December 31, 1988, and submitted it to the Federal Reserve Bank of Dallas. This FR Y-6 Form did not include Certified Financial Statements. However, it did include Parent Company Comparative Balance Sheet, Comparative Statement of

Appendix D

Income and Expenses (Parent), Statement of Changes in Stockholders Equity (Parent), Cash Flow Statement (Parent), Consolidated Comparative Balance Sheet, Comparative Statement of Income and Expenses (Consolidated), Cash Flow Statement (Subsidiary), prepared by Jeff Jacobs, the bank's in-house certified public accountant with some 35 years of experience.

32. On September 19, 1989, after the Supreme Court denial of certiorari, CBC retained Boatright, Kelly & Co. of Amarillo, Texas, to audit the consolidated balance sheet of CBC and its subsidiary bank as of December 31, 1989. Exhibit 33.

33. On April 25, 1989, W. Arthur Tribble, Vice President of the Federal Reserve Bank of Dallas, informed Mr. Kent

Appendix D

Carruthers, President of CBC, by letter that CBC's December 31, 1988, FR Y-6 Form did not meet the filing requirements because it did not contain Certified Financial Statements. The letter advised CBC to file Certified Financial Statements by June 15, 1989. Exhibit 34.

34. On May 9, 1989, Lynell Skarda, on behalf of CBC, submitted a reply to Mr. Tribble's April 25, 1989 letter. In lieu of Certified Financial Statements, Mr. Skarda submitted a "Report of Agreed on Procedures by Grant Thornton" as to the bank only. See Exhibit 35.

35. The report submitted did not include consolidated statements for CBC and the Bank and the information provided was not certified by Grant Thornton. The report specifically stated that

because the procedures performed did not constitute an examination made in accordance with generally accepted auditing standards, no opinion could be expressed. As of June 15, 1989, CBC did not comply with the requirements that its FR Y-6 Form for December 31, 1988, include Certified Financial Statements.

36. The Federal Reserve Bank of Dallas Report of Inspection of CBC, dated September 18, 1989, and sent to CBC on December 1, 1989, stated that CBC's 1988 FR Y-6 Form did not meet the requirements for Certified Financial Statements.

37. On January 20, 1990, CBC responded to the criticism by the Dallas Reserve Bank contained in the examination report. Exhibit 36.

38. On March 29, 1990, CBC filed its 1989

Appendix D

FR Y-6 with the Reserve Bank. This FR Y-6 Form included Certified Financial Statements for 1989 but not for 1988. Exhibit 37.

39. On June 21, 1990, J. Virgil Mattingly, Jr., General Counsel for the Board, advised respondents of contemplated civil money penalties. Exhibit 38.

40. On June 26, 1990, CBC forwarded its engagement letter with Boatright, Kelly & Co. for an audit for the 1990 fiscal year. Exhibit 39.

41. On June 29, 1990, Boatright, Kelly & Co. responded to the criticism in General Counsel Mattingly's June 21, 1990, letter (Exhibit 38). Exhibit 40.

42. On July 5, 1990, CBC replied to General Counsel Mattingly's letter of June 21, 1990. Exhibit 41 attached.

Appendix D

43. On July 10, 1990, the Federal Reserve Bank of Dallas forwarded to CBC the Reserve Bank's Report of Bank Holding Company Inspection as of March 31, 1990. Exhibit 42.

44. On September 24, 1990, Lynell G. Skarda and Kent Carruthers met with Ms. Nancy Oakes, attorney for the Board, and V. Lynn Black, of the Dallas Reserve Bank, met by mutual consent in a conference room at the Lubbock, Texas airport. After a discussion, the Federal Reserve representatives presented to the CBC representatives proposed consents to assessment of a civil money penalties in the amounts of $10,000 each for CBC, Lynell G. and Langdon L. Skarda, and Kent Carruthers. Exhibits 43A, 43B, 43C, and 43D respectively.

45. On September 27, 1990, Lynell G.

Appendix D

Skarda wrote Ms. Oakes suggesting an audit of the statement of condition of the Bank and CBC as of December 31, 1988, by Boatright, Kelly & Co. Exhibit 44.

46. On November 6, 1990, Ms. Oakes wrote that the audit proposed by Lynell G. Skarda in Exhibit 44 regarding 1988 "would serve as a factor to mitigate the amount of the proposed penalty." The letter further advised that the audit would not preclude the initiation of civil money penalty proceedings in the absence of a settlement of the matter. Exhibit 45. Such an audit in fact was not conducted.

47. On April 13, 1991, Lynell G. Skarda received a Notice of Assessment, Docket No. 90-033-CMP-I1, assessing a $10,000 civil money penalty;

Appendix D

Langdon L. Skarda was served with Docket No. 90-033-CMP-I2 assessing a $5,000 civil money penalty; Kent Carruthers received Docket No. 90-033-CMP-I3 assessing a $5,000 civil money penalty, and as President of CBC he received Docket No. 90-033-CMP-BHC assessing a $10,000 civil money penalty against CBC all of which had been issued by the Board on April 5, 1991.

48. On April 19, 1991, entries of appearance and powers of attorney by the respondents as well as requests for formal hearings were mailed and received by the Board on April 22, 1991.

49. The Bank has been examined by the FDIC and the Director of Financial Institutions of the State of New Mexico as follows:

Appendix D

Examined by:	Examined as of Close of Business:
State - FDIC	July 30, 1980
State - FDIC	November 13, 1981
State	November 30, 1982
FDIC	November 10, 1983
State	September 28, 1984
State	July 19, 1985
State	February 27, 1987
State - FDIC	July 22, 1988
State - FDIC	May 4, 1990

CBC was examined by the Dallas

Reserve Bank as follows:

Inspection Commenced:	Financial Statement as of:
October 16, 1985	June 30, 1985
November 14, 1985	September 30, 1988
September 28, 1989	June 30, 1989
May 29, 1990	March 31, 1990

Dated this 1st day of November 1991.

/s/ Douglas B. Jordan
Senior Attorney
Board of Governors
of the Federal
Reserve System

Dated this 4th day of November, 1991.

/s/ Lynell G. Skarda
LYNELL G. SKARDA
Attorney for CBC, Inc.,
Langdon L. Skarda, Kent
Carruthers, and Lynell
G. Skarda, pro se and
as Attorney-in-Fact

SUPPLEMENTAL APPENDIX

Supreme Court
FILED
MAR 17 1994
OFFICE OF THE CLERK

No. 93-1458

In The

Supreme Court of the United States

October Term, 1993

CBC, INC.; LYNELL G. SKARDA; LANGDON L. SKARDA; AND KENT CARRUTHERS, Institution-Affiliated Parties of CBC, Inc.,

Petitioners,

vs.

BOARD OF GOVERNORS OF THE FEDERAL SYSTEM,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LYNELL G. SKARDA, *Pro Se*
Attorney for Petitioners
P.O. Box 400
Clovis, New Mexico 88101
(505) 762-9163

45 pp

TABLE OF CONTENTS

Page

Appendix A — Decision and Recommended Order by Paul S. Cross, Administrative Law Judge Dated July 9, 1992 ..... 1sa

Appendix B — Final Decision and Order of Board of Governors of the Federal Reserve System Dated November 17, 1992 ..... 35sa

APPENDIX A — DECISION AND RECOMMENDED ORDER BY PAUL S. CROSS, ADMINISTRATIVE LAW JUDGE DATED JULY 9, 1992

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

Docket No. 90-033-CMP-BHC
90-033-CMP-I1
90-033-CMP-I2
90-033-CMP-I3

In the Matter of
CBC, INC.,
Clovis, New Mexico

and

In the matter of
LYNELL G. SKARDA,
LANGDON L. SKARDA, and
KENT CARRUTHERS,

Institution-Affiliated Parties of
CBC, Inc.,
Clovis, New Mexico

Respondents.

DECISION AND RECOMMENDED ORDER

By Paul S. Cross Administrative Law Judge:

Appendix A

This is an administrative civil money penalty action brought by the Board of Governors of the Federal Reserve System (the "Board") against a bank holding company, CBC, Inc. ("CBC"), and three officers and directors of CBC, Lynell Skarda, Langdon Skarda, and Kent Carruthers. The Board issued Notices of Assessment of Civil Money Penalties against the Respondents pursuant to 12 U.S.C. § 1847, alleging that the individual Respondents were responsible for CBC's refusal to file for the year 1988 an annual report containing consolidated financial statements certified by an independent public accountant, as required by the Board's Regulation Y and Form FR Y-6. Accordingly, the Board assessed penalties in the amounts of $10,000 each against CBC and Lynell Skarda and $5,000 each against Langdon Skarda and Kent Carruthers.

Respondents oppose payment of the penalties and as a result these proceedings were referred to this administrative law judge.

The parties entered into stipulations as to relevant facts and, after an exchange of pre-hearing briefs and proposed findings and conclusions, a hearing (oral argument) was held before me at Washington, D.C. on June 1, 1992. Based on the undisputed stipulated facts, the submitted pleadings, and the arguments at the hearing, I recommend that the Board impose penalties against the Respondents in the amounts set forth in the Notices of Assessment.

I. STATEMENT OF THE CASE

A. STATUTORY AND REGULATORY FRAMEWORK

The Bank Holding Company Act of 1956 (the "BHC Act") provides the Board with exclusive authority to administer the Act. Thereunder, the Board may issue such orders and adopt regulations

as may be necessary to enable the Board to carry out the purposes of the BHC Act and to prevent evasions thereof. 12 U.S.C. § 1844(b). The BHC Act also specifically authorizes the Board, from time to time, to require reports under oath to keep it informed as to whether the provisions of the BHC Act and its implementing regulations and orders have been complied with. 12 U.S.C. § 1844(c).

Section 225.5 of the Board's Regulation Y (12 C.F.R. § 225.5) sets out rules governing registration of bank holding companies with the Board and reports that the Board requires of bank holding companies. Also described therein is the Board's authority to require additional reports and to examine or inspect any bank holding company or any of its subsidiaries. Regulation Y requires that each bank holding company furnish, in the manner and form prescribed by the Board, an annual report for the company's operations for each fiscal year during which it is a bank holding company. 12 C.F.R. § 225.5(b).

The instructions on Federal Reserve Form FR Y-6 require each bank holding company to submit an annual report within 90 days of the end of the company's fiscal year. *See* Exhibit 20. Form FR Y-6 requires (*inter alia*):

> (1) the company must submit its two most recent yearly financial statements;
>
> (2) a company with consolidated assets in excess of $150 million must file financial statements of the holding company as consolidated with its subsidiaries, as well as for the parent company only;

(3) the consolidated financial statements for a bank holding company with consolidated assets in excess of $150 million must be certified by an independent public accountant;

(4) all financial statements should be prepared in accordance with generally accepted accounting principles.

In addition, Form FR Y-6 reserves to the Federal Reserve System the right to require the filing of additional statements and information if it regards the information submitted on the FR Y-6 Form to be insufficient.

As applicable to this case, the BHC Act provides for civil money penalties of up to $1,000 per day for violations of the Act, or any order or regulation implementing the Act. 12 U.S.C. § 1847(b)(1).[1] The term "violates" is defined to include "any action, (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding and abetting a violation." 12 U.S.C. § 1847(b)(1).[2] In determining the amount of the penalty, the Board takes into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the company or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require. 12 U.S.C. § 1847(b)(2).

---

1. These amounts have been increased by legislation applicable to conduct engaged in after August 1989 to $20,000 per day for intentional failure to file required reports. 12 U.S.C. § 1847(d)(2). Since the relevant conduct in this case primarily occurred prior to August 1989, the earlier, lower, limits apply.

2. This language is now part of 12 U.S.C. § 1847(b)(5).

Appendix A

B. STATEMENT OF THE FACTS

1. *Parties*

Since the Board approved CBC's application to become a bank holding company on December 31, 1981, CBC has been a bank holding company, subject to the Board's jurisdiction under the BHC Act, 12 U.S.C. § 1841 *et seq.* Lynell G. Skarda is and has been at all times pertinent to this case the Secretary-Treasurer, a director, and a principal shareholder of CBC. Stipulation of Fact ("Stip.") 5, 6. Langdon Skarda is and has been at all times pertinent to this case, the Vice President, a director, and a principal shareholder of CBC. Stip. 5. Kent Carruthers is and has been since 1986 a director and the President of CBC. Stip. 5. CBC's only subsidiary is the Citizens Bank of Clovis (the "Bank"), a state bank chartered in 1916 by the State of New Mexico. The Bank is not a member of the Federal Reserve System. Stip. 1-2, 6.[3]

2. *CBC and the Board's Reporting Requirements*

In becoming a bank holding company, CBC became subject to Board regulations and to requirements imposed by statute, Board regulations, and Board procedures. One such requirement, issued pursuant to the BHC Act and the Board's Regulation Y, is that a bank holding company shall file an annual report of the company's operation with the Federal Reserve Bank within three months of the end of the company's fiscal year. Stip. 7; Exhibit 20. Board

---

3. CBC owns all of the stock of the Bank. Stip. 6. Since 1968, Lynell G. Skarda has been Chairman of the Bank's board of directors and Langdon L. Skarda Secretary of the Bank's board of directors. Stip. 1. Since January 31, 1986, Kent Carruthers has been President of the Bank and a director. Stip. 1 Together, the Skardas and Carruthers make up the entire board of directors of the Bank. Stip. 1.

instructions on the annual report form, Form FR Y-6, require each bank holding company with consolidated assets (*i.e.*, those of the bank and the bank holding company combined) in excess of $150 million, [4] to submit its annual report in conformity with a number of requirements, including that the consolidated financial statements must be prepared in accordance with generally accepted accounting principles and must be certified by an independent public accountant ("Certified Financial Statements"). Stip. 7.

From its inception as a bank holding company, CBC sought to be excused from the requirement of Certified Financial Statements. Certain qualified waivers in fact were granted CBC by Board agents. In granting CBC a waiver of the certified audit requirement *for the year 1982 only*,[5] the Federal Reserve Bank of Dallas emphasized that the waiver was not permanent. Stip. 8; Exhibit 6. In granting CBC a waiver for fiscal year 1983, the Dallas Reserve Bank transmitted a denial of CBC's request for a permanent waiver of the certification requirement. Stip. 10;

---

4. When CBC became a bank holding company, the threshold asset amount was $100 million in banking assets. The threshold was raised to $150 million in consolidated assets in a revision effective at the beginning of 1986. From 1981 through 1985, the banking assets of CBC and the Bank were not less than $100 million in each year. Stip. 4. From January 1, 1986 to the present, the consolidated assets of CBC and the Bank were not less than $150 million in each year. Stip. 4. Accordingly, CBC has at all times been subject to the Board's requirements for Certified Financial Statements.

5. This request was made pursuant to a provision then contained in the instructions on the Form Y-6 which acknowledged the Board's discretion to grant waivers from the certification requirement on the basis of "undue burden and expense". Stip. 7. This provision was deleted when the form was revised in 1985. *Compare* Exhibit 5 *with* Exhibit 20.

Exhibit 8.[6] Yet, CBC persisted in seeking an exemption from Board reporting requirements. CBC had its own "house" employee who prepared financial statements. CBC saw no need to hire an "outside" CPA. CBC also disputed Board authority to issue regulations on the subject.

3. *Judicial Affirmance of Board's Reporting Requirements*

In February 1986, CBC filed a petition for review of the Board's reporting requirements in the United States Court of Appeals for the Tenth Circuit. Stip. 22. The Tenth Circuit upheld the reporting requirements on August 30, 1988. *CBC, Inc. v. Board of Governors*, 855 F.2d 688 (10th Cir. 1988), *cert. denied* 489 U.S. 1096 (1989). The Circuit Court rejected CBC's arguments that the Board had no authority to require bank holding companies to file consolidated financial statements certified by an independent auditor. The Circuit Court ruled that the certification requirement derived from a reasonable interpretation of the BHC Act that was also supported by the statute's legislative history. *Id.* at 690-91. The Circuit Court noted that independently certified financial statements provide the Board with information that is qualitatively different from that provided in uncertified financial statements, and that such certification provides the Board with an increased

---

6. The permanent waiver denial letter explained that the certification requirement was regarded as necessary to the Federal Reserve's supervisory responsibilities, even where, as in closely-held institutions, certification was not necessary to assure disclosure to stockholders. Exhibit 8. While the petition for a permanent waiver was pending, a waiver for the year 1984 was granted. Stip. 10. A waiver for the year 1985 was granted because the Board was then considering the later-issued proposal to raise the minimum asset threshold for the certification requirement to $150 million. Stip. 14. Each of the waivers issued to CBC was expressly limited to the specific year involved, and expressly stated to be inapplicable to any future years. *See* Stip. 8, 10, 14, 16; Exhibits 6, 8, 13, 15.

measure of reliability regarding the financial statements. *Id.* at 691. The Circuit Court found that the Board's authority to require such reports was not at all limited by the fact that other agencies had supervisory jurisdiction over the subsidiary bank. *Id.* at 692. The Circuit Court also rejected the argument that there was no rational basis for the choice of $150 million in consolidated assets as the threshold for the reporting requirement. *Id.* at 690. Accordingly, the Circuit Court held that the Board's Y-6 reporting requirements were entirely within the Board's statutory authority and were valid. *Id.* at 693. Still, CBC did not comply with Board regulations. Nor did CBC obtain a "stay" of Board requirements. Instead, CBC sought U.S. Supreme Court review. However, on March 27, 1989, the Supreme Court denied a CBC petition for certiorari relative to the decision of the Circuit Court.[7] Stip. 28.

4. *CBC's Continued Noncompliance After Judicial Affirmance of the Board's Reporting Requirements*

When CBC filed its FR Y-6 Form for 1988 on March 21, 1989, the FR Y-6 Form did not include Certified Financial Statements and was not prepared in accordance with generally accepted accounting principles. Stip. 31; Exhibit 32. On April 25, 1989, the Dallas Reserve Bank advised Kent Carruthers, President of CBC, that the submission for 1988 did not meet the filing requirements since it did not contain Certified Financial Statements, and further advised CBC to file Certified Financial Statements by June 15, 1989. Stip. 33; Exhibit 34.

On May 9, 1989, Respondent Lynell Skarda, on behalf of

---

7. The Circuit Court's judgment, as noted, was issued on August 30, 1988 and as also noted, CBC did not obtain a stay of the mandate of the Court of Appeals while it sought review in the United States Supreme Court. Stip. 27.

CBC, submitted, in reply to the Reserve Bank's letter, a report prepared, but not certified, by Grant Thornton, a public accounting firm. Exhibit 32. The Grant Thornton report did not meet the Board's requirements in that it did not include consolidated statements for CBC and the Bank, and the information provided was not certified by the accounting firm. Indeed, the Grant Thornton Report specifically stated that, because the procedures performed did not constitute an examination made in accordance with generally accepted auditing standards, no opinion could be expressed. Stip. 35; Exhibit 32. As of June 15, 1989, CBC still had not filed a report for 1988 that complied with the requirements of the BHC Act and Regulation Y. Stip. 35.

Despite repeated prompting and criticisms from the Federal Reserve System,[8] CBC never filed FR Y-6 Forms for 1988 that meet the Board's requirements. Stip. 46.

II. DISCUSSION

Because the basic facts are agreed upon in stipulations, including the Respondents' noncompliance with the Board's duly promulgated regulatory requirements, and because the validity of the Board's reporting requirements are judicially affirmed, the issues for adjudication in this proceeding are whether the Respondents have established an affirmative defense that blocks

---

8. The Reserve Bank's Report of Inspection of CBC sent to CBC on December 31, 1989 stated that CBC's 1988 FR Y-6 Form did not meet the Board's Regulation Y and Form Y-6 requirements. Stip. 36. On March 29, 1990, CBC submitted its FR Y-6 Form for December 31, 1989 to the Reserve Bank. This form included Certified Financial Statements for 1989, but not for 1988. Stip. 38; Exhibit 37. CBC was advised in May 1990 by the Reserve Bank that the submitted FR Y-6 Form for December 31, 1989 was incomplete in that it did not include the certified 1988 financial statements, as required. Stip. 39; Exhibit 38.

the Board from bringing this action, and whether the Board's penalties are reasonable. I find that the Respondents' proffered defenses are without merit, and that the Board's penalty assessments are justified and reasonable in amount.

A. THE RESPONDENTS' AFFIRMATIVE DEFENSES ARE WITHOUT MERIT

The Respondents' affirmative defenses include claims that the Board's grant of limited waivers estopped the Board from later enforcing the requirements, that the Board's assessment had the effect of denying CBC access to the judicial system, that the case is moot, and that the Board may not assess civil money penalties in the absence of a prior cease and desist order. These claims are not supported by applicable law nor by the facts of record.

1. *Respondents' Objections to the Board's Requirements that Reports Include Financial Data For a Preceding Year are Without Merit.*

There is no merit to Respondents' argument that CBC should have been excused from the reporting requirements for 1988 as if CBC had not operated in that year. CBC Brief at 7-8. Respondents do not articulate any basis for their asserted parallel between 1981, the year before CBC became a bank holding company, and 1988, the year in which the Tenth Circuit upheld the Board's requirements against Respondents' challenge. To the extent that Respondents contend that their court challenge to the reporting requirements in 1988 automatically nullified the operation of the requirements, the arguments are rebutted by the fact that Respondents requested and were denied a stay of the reporting requirements by the Board pending the outcome of the litigation. Even while pursuing its Circuit Court challenge, CBC should have

been in compliance with Board requirements. Its failure to comply was at its own peril. Exhibit 26. Respondents were on notice, accordingly, that the requirements continued to apply to CBC during 1988. There is no legal basis for the proposition that, in the absence of an express stay, the existence of litigation inherently suspended the operation of agency requirements. In short, although Respondent's were entitled to exhaust their legal remedies, their exercise of that right did not excuse them from compliance.

2. *The Board Did Not Deny Respondents Access to the Judicial System.*

Also without merit is Respondents' argument that the Board's assessment of penalties for noncompliance during a year when CBC was engaged in litigation with the Board constitutes a denial of CBC's access to the judicial process. CBC had ample access to the judicial system: its challenge to the Board's reporting requirements was briefed and argued in the Tenth Circuit, and its petition for certiorari was briefed, opposed by the Board, and denied by the Supreme Court. Accordingly, the essence of CBC's complaint is not with its access to the judicial process, but with the results of that process. The record demonstrates that the Board charged Respondents with a lack of "good faith", not because they litigated with the Board, but because they refused to comply with the outcome of that litigation.

3. *This Penalty Proceeding is Not Moot*

Respondents' claim that this case is moot because the information contained in certified reports for 1988 would not be useful to the Board in 1992 reflects a misunderstanding of the regulatory process and the nature of the relief sought by the Board

in this proceeding. The Board has not sought specific performance of the certification requirement for 1988, but rather seeks penalties for Respondents' refusal to comply with the reporting requirements at the specified time.[9] The passage of time does not vitiate, excuse, or moot that violation. Otherwise, regulated entities would have incentive to drag their feet in complying with the Board's requirements until the passage of time had made the information stale.

By complaining that compliance would have cost $30,000 or more (Resp. Brief 12), Respondents contradict their own argument that they did not profit by their actions (Resp. Brief 15, 20). Respondents' claim (Resp. Brief 15) that the penalty amounts should be reduced by an offset amount equal to the money and time they spent in unsuccessful litigation to resist the Board's requirements is without support or merit. The Board it may be noted, has had its own litigation expenses.

4. *There is no Basis for Respondents' Claim that a Cease and Desist Proceeding Must Precede Assessment of a Civil Money Penalty.*

Several tools are available to the Board to enforce its statutes, regulations, and orders governing bank holding companies. The use of one tool (assessment of civil money penalties under 12 U.S.C. § 1847(b)) does not require the use of other independent tools (*e.g.*, cease and desist authority under 12 U.S.C. § 1818(b)). There is no statutory or other requirement that the Board bring a formal action under 12 U.S.C. § 1818 before applying the independent penalties of 12 U.S.C. § 1847(b)(2).

---

9. Accordingly, the cases cited by Respondents for the proposition that equity will not require performance of a futile act are simply inapposite.

Appendix A

5. *Respondents' Estoppel Argument is Legally and Factually Baseless.*

Even in those cases where the principle of estoppel against the government has been recognized,[10] courts have found that the government may not be estopped unless the non-government party establishes, in addition to the elements of traditional estoppel, that the government action complained of amounts to "affirmative misconduct".[11] In addition, in an instance of strict estoppel, traditional elements must be satisfied. These are:

---

10. "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984).

While some cases have found that government agencies may be estopped when they act in a proprietary rather than a sovereign capacity (*e.g., Federal Deposit Insurance Corp. v. Harrison*, 735 F.2d 408, 410-411 (11th Cir. 1984) (finding that FDIC, acting in a corporate capacity as receiver, was engaged in proprietary function)), there is no basis for argument here that the Board's reporting requirements serve anything other than a governmental regulatory function.

11. *Vickars-Henry Corp. v. Board of Governors*, 629 F.2d 629, 635 (9th Cir. 1980); *Penny v. Giuffrida*, 897 F.2d 1543, 1547 (10th Cir. 1990). Such "affirmative misconduct" need not be criminal and may include repeated and prolonged nonfeasance as well as misfeasance. In this regard, repeated failures by a governmental agency over a lengthy period of years to adopt a particular interpretation of an ambiguous regulatory provision or document may preclude a retroactive governmental interpretation of the regulatory provision or document in a manner which is financially adverse to parties which have relied upon the prior ambiguity and non-action by the governmental agency. In such a circumstance, a ritualized version of governmental fraud or estoppel is not truly involved. Instead, the repeated and lengthy governmental failure to act is at least presumptive (but perhaps rebuttable) evidence that the new retroactive governmental interpretation of an ambiguous regulatory provision is erroneous.

Appendix A

1. the party to be estopped must know the facts;

2. the party to be estopped must either intend that its conduct shall be acted on or must so act that the other party has a right to believe it so intended;

3. the party asserting the estoppel must be ignorant of the true facts;

4. the party asserting the estoppel must rely to its detriment on the conduct.

Penny v. Giuffrida, 897 F.2d 1543, 1545-1546 (10th Cir. 1990).

Under this strict standard or even under a standard relating to the interpretation of ambiguous government regulations, estoppel is inapplicable in this case. Far from "sitting idly by" as Respondents charge (Resp. Brief 20), the Board repeatedly informed the Respondents of their obligations under the Board's rules, litigated the validity of those obligations in the Tenth Circuit, subsequently advised Respondents that they continued to fail to meet their obligations under the requirements, and ultimately warned Respondents of the Board's intent to assess penalties. The Board's insistence upon CBC's compliance with the Board's requirements pending Tenth Circuit review obviated any possible expectation Respondents might have had that the requirements would be suspended or waived. When the Reserve Bank found in April, 1989 that Respondents' reports filed in March, 1989 did not comply with the Board's requirements, the Reserve Bank so notified the Respondents and insisted on compliance by a time certain. Stip. 33, Exhibit 34. Accordingly, there was no "acquiescence" in CBC's failure to observe the requirements, no "affirmative misconduct" by the Board, and no reasonable

"reliance" by Respondents that would support an estoppel against the Board's insistence on compliance. As well, all of the prior waivers granted by the Board to CBC were temporary and were plainly so identified.

B. THE PENALTIES ASSESSED IN THE NOTICES ARE JUSTIFIED AND REASONABLE IN AMOUNT.

1. The Respondents' Refusal to Comply with the Reporting Requirements Establishes the Basis for Civil Money Penalties.

a. *Res Judicata Precludes Respondents from Challenging the Validity of the Board's Reporting Requirements.*

In *CBC, Inc. v. Board of Governors*, 855 F.2d 688 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989), the Court rejected CBC's arguments that the Board had no authority to require bank holding companies to file consolidated financial statements certified by an independent auditor. Under the *res judicata* doctrine of claim preclusion, this holding precludes CBC from challenging the validity of the Board's Y-6 reporting requirements, even under any new theory. "If the plaintiff loses, the entire claim is barred by the judgment, even as to evidence, theories, arguments, and remedies that were not advanced in the first litigation." C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4406 at 45.[12] Because the individual Respondents are in privity with CBC

---

12. "When an issue of . . . law is actually litigated and determined . . . and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties". *American Iron and Steel Institute v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989) (*quoting* Restatement (Second) of

(Cont'd)

as its officers and directors, and CBC acted only through these individuals, they are similarly bound.[13] There is no basis for any claim that CBC or the individual Respondents lacked a full and fair opportunity to argue their position in the Tenth Circuit case. Accordingly, the validity of the Board's reporting requirements may not be challenged in this proceeding.[14]

b. *The Record Establishes CBC's Noncompliance with the Reporting Requirements.*

The stipulated facts establish CBC's failure to comply with the Board's reporting requirements. The Respondents

---

(Cont'd)
Judgments § 27 (1982)). Preclusion of parties from recontesting matters that they have had "a full and fair opportunity to litigate protects their adversaries from the expense and vexations attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 154 (1979) (footnote omitted).

13. "Preclusion is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party." C. Wright, *et al. Federal Practice and Procedure*, § 4451 at 430. "Such relationships between a party and a nonparty are most often found when [*inter alia*] the owners and officers of a closely held corporation control corporate litigation." *Id.* at 431.

14. There is no basis for any argument that the Board legally waived its requirements as to CBC, since the Board zealously and repeatedly defended the applicability of those requirements to CBC. Each of the annual waivers granted to CBC was carefully limited to make clear that no permanent waiver had been granted, and that a certified report or a new waiver request would be required for any future years. *See* Stip. 8, 10, 14, 16; Exhibit 6, 8, 13, 15. After the Tenth Circuit ruled in 1988, the Board renewed its insistence on the filing of reports that met its requirements. *See* Stip. 26, 27. The Board was therefore consistent in its position with regard to CBC's obligations.

acknowledge that the Board's requirements called for financial statements certified by an independent public accountant for bank holding companies of the size of CBC. The Respondents stipulate that the financial statements filed by CBC for fiscal year 1988 did not include consolidated statements for CBC and the Bank and they stipulate that the statements were never certified by an independent accountant. Stip. 35; 46. Thus, it cannot reasonably be argued that CBC satisfied the Board's reporting requirements for 1988 and 1989.[15]

c. *Undisputed Facts Show that the Individual Respondents Also Failed to Comply with the Board's Reporting Requirements*

The BHC Act defines the term "violates" to include "any action, (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding and abetting a violation."[16] Lynell Skarda, as the signatory of the nonconforming statements (Stip. 31) together with the other individual Respondents, as directors of CBC, are responsible for CBC's obligation to file conforming reports, and therefore share the responsibility for CBC's lack of compliance. *See Stanley v.*

---

15. The deficiencies in the 1988 report automatically rendered the report for 1989 deficient (even though the 1989 report otherwise complied with the Board's requirements), since each Y-6 report requires comparative statements for the immediately past year as well as for the current year, and both statements must be certified by an independent accountant.

16. The definition of the term "violates", before 1989, appeared in 12 U.S.C. § 1847(b)(2). The definition is currently set forth at 12 U.S.C. § 1847(b)(5). Because the reporting requirements implement provisions of the BHC Act and Regulation Y, the failure to file is a violation of 12 U.S.C. §§ 1844(c), 1847 and of 12 C.F.R. § 225.5(b).

Board of Governors, 940 F.2d 267, 272 (7th Cir. 1991) (affirming Board order finding that directors of a bank holding company had an affirmative personal obligation to see that company complies with cease-and-desist order). Furthermore, each of the individual Respondents was an officer of CBC and aware of the Board's criticisms through correspondence with the Reserve Bank or the Board. Accordingly, each of the individual respondents participated in or aided in the violations at issue.

2. The Board Acted Reasonably and Within its Discretion in the Amounts of the Penalties Assessed.

As applicable to this case, the BHC Act authorizes penalties for violations of the Act of up to $1,000 a day for each day that the violations continue.[17] Because the violations in this case have been outstanding since March 29, 1989, the total amount that could have been assessed against each of the Respondents totalled over $600,000 as of the beginning of this case on April 5, 1991. In determining the amount of the penalty, however, the Board must take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the company or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require. 12 U.S.C. § 1847(b)(2).

The Board seeks to assess $10,000 each against CBC and Lynell Skarda, the individual Respondent who signed the

---

17. As explained above, these amounts have been increased by legislation applicable to conduct engaged in after August 1989 to $20,000 per day for intentional failure to report. 12 U.S.C. § 1847(d)(2). While the lower limits apply in this case, the increased severity of the penalties reflects the Congressional view of the gravity of the offense.

nonconforming statements, and $5,000 each against Langdon Skarda and Kent Carruthers, both of whom were officers and directors of CBC. These amounts represent a small fraction of the maximum amount authorized by the statute, and reflect a reasonable judgment that a penalty for the Respondents' knowing and continued violation of the Board's requirements is appropriate in order to deter noncompliance. Accordingly, I recommend that the assessments be upheld. In this regard, the greater amounts imposed upon CBC and Lynell Skarda are warranted because CBC is the principal offender, along with Lynell who has played the leading role in orchestrating the non-compliance of CBC (See findings 13 through 23 of the appendix hereof).

a. *The Persistent Violations of Significant Statutory and Regulatory Requirements Support Penalties in the Amounts Assessed.*

The Board's reporting requirements are central to its responsibility to supervise bank holding companies pursuant to the BHC Act, its implementing regulations, and related statutes. "The Board is better able to detect abuses related to the control of commercial credit if it can require informative and reliable reports." *CBC. Inc. v. Board of Governors, supra,* 855 F.2d at 691. The requirement of certified financial statements serves regulatory goals in that it ensures that the accounting and internal controls of a holding company and the subsidiary bank are verified by independent experts. The "outside" audit by an expert makes it easier to uncover fraud, misappropriation, or negligence in the operation of the institution.[18] These audits complement formal

---

18. "Independently certified financial statements provide the Board with information that is qualitatively different from that provided in uncertified financial statements, in a reporting format that may differ form those required by

(Cont'd)

regulatory examinations in both frequency and scope of coverage. Accordingly, after being assigned responsibility for bank holding companies in 1956,[19] the Board has maintained a reporting requirement as part of the FR Y-6 annual report, of the holding company. The requirement is that holding companies of banks above a certain size submit consolidated financial statements certified by independent auditors.

The Respondents' repeated refusals to comply with the Board's applicable reporting requirements, after any doubt as to the legality of the requirements had been put to rest, were not insignificant, trivial, or *de minimis* oversights. Instead, the refusals constituted willful defiance of clearly-expressed requirements. Money penalties are warranted to deter noncompliance with the BHC Act and the Board's implementing regulations, by the bank holding company industry in general as well as by the Respondents involved here. Thus, I find that the Board acted appropriately upon consideration of the "gravity" of the violations.

b. *The Respondents' Persistent. Willful Noncompliance Following Their Unsuccessful Judicial Challenge Evidences a Lack of Good Faith.*

One of the factors to be considered in assessing penalties is the Respondents' "good faith", or the lack thereof. 12 U.S.C. § 1847(b). Even before the judicial process had run its lengthy

---

(Cont'd)
other regulatory agencies. The certification provides the Board with an increased measure of reliability regarding the financial statements." *CBC Inc. v. Board of Governors, supra,* 855 F.2d at 691.

19. 22 Fed. Reg. 2341 (1957).

course to the U.S. Supreme Court and before the Board's requirements were definitively upheld by the Tenth Circuit, the Respondents should have prepared for the filing of audited 1988 financial statements. The Respondents' continued and willful rejection of the Board's requirements, even after the Circuit Court had rejected the Respondents' challenge to the Board's authority and its reporting requirements, and after the Respondents had been expressly directed to comply, demonstrates a lack of good faith that warrants civil money penalties. The fact that CBC elected to comply with subsequent years' reporting requirements does not negate the knowing, persistent, and deliberate decision of CBC and its management to ignore a clear legal obligation by a regulated company.

c. *Considerations of Justice support penalties in the amounts assessed.*

In assessing civil money penalties, the Board is authorized to consider "such other factors as justice may require". One of the components of justice is that violations that result in financial gain to the violator should be penalized with a penalty that at least equals the amount of the financial gain. The record indicates that the cost of complying with the Board's requirement for the year 1988 was estimated by an accounting firm to be $30,000 or more. Record 938.[20] Accordingly, penalties in excess of these amounts are warranted to ensure that the Respondents do not profit from their noncompliance. Thus, the penalties sought by the Board, which total $30,000, are in the circumstances more than reasonable and I think modest.

---

20. At oral argument, Respondent Skarda indicated that the uncertified statements he had had prepared by non-employee accountants cost CBC $10,000 a year. Tr. 46. CBC had previously had uncertified reports prepared by its own salaried employee. Tr. 32.

Appendix A

By continuing to refuse to comply with requirements of general applicability, the Respondents sought to be treated differently from other companies similarly situated that *do* comply with the Board's requirements, whatever the burden and expense. Accordingly, the principles of fairness and evenhanded application of the laws dictate that the Respondents should not receive special treatment, and that their noncompliance be penalized in amounts at least equal to the expenses they have avoided by noncompliance and the unfair advantage they have gained over similar bank holding companies that comply with the Board's requirements. Of course, Respondents have incurred legal expenses in their protracted dispute with the Board, but the latter also has been required to expend its resources.

d. *The Respondents' Financial Resources Support Penalties in the Amounts Assessed.*

It is stipulated that CBC's consolidated assets exceed $150 million and that Lynell and Langdon Skarda are principal shareholders. In light of the Respondents' financial resources contained in the record, the amounts of the civil money penalties assessed constitute no undue burden on the Respondents.

In addition, the Board offered the Respondents an opportunity to show that their financial resources were such that lower amounts should be assessed. On June 21, 1990, the Board's General Counsel wrote separately to Lynell and Langdon Skarda and Kent Carruthers to inform them of the Board staff's intent to recommend the assessment of civil money penalties against them. The letters requested that the Respondents submit financial statements and any evidence that would mitigate against the assessment of a civil money penalty. Stip. 39; Exhibit 38. On behalf of the Respondents, Lynell Skarda replied to the General Counsel's letter on July 5,

1990, but did not include any financial information. Stip. 42; Exhibit 41.

The Board does not have full responsibility to prove the size of a respondent's financial resources, information that is inherently within the control of the respondent. *See Stanley v. Board of Governors,* 940 F.2d 267, 274 (7th Cir. 1991) ("An awkward state of affairs would arise if the Board was required to bear full responsibility for proving the financial condition of the individual Directors who obviously oppose higher penalties and whose self-interest is served by painting as grim a picture as possible of their respective financial conditions."). Here, the Board based its preliminary findings on the information available to it after giving the Respondents an opportunity (which they did not take) to provide financial information. Stip. 39, 42; Exhibits 38, 42. The factor of financial resources therefore is consistent with the penalties sought to be imposed by the Board.

e. *The Amounts of the Penalties Are Consistent with the Status of First-Time Violators.*

Although the Respondents did not file required reports for the years 1982-1987, the Board did not charge CBC with violations for those years because of particular circumstances relating to each of those years. The amount of the penalties is consistent with the status of "first-time violators."

f. *Summary.*

Accordingly, Respondents' challenge to the amount of the penalties assessed (Resp. Brief 29-30) is unpersuasive.[21] Upon

---

21. Respondents' citation of the criminal penalty contained in 12 U.S.C. (Cont'd)

consideration of each of the statutory civil money penalty factors (good faith, financial resources, gravity of violation, the existence of previous violations, and other considerations of justice) I find that the penalty amounts are warranted.[22] Especially in light of the Respondents' concession that they saved at least $30,000 by not complying with the Board's requirements at an earlier time, the total of $30,000 in penalties at issue here is plainly not disproportionate to the gravity of the offense, and represents a reasonable exercise of the Board's discretion.

ULTIMATE FINDING AND RECOMMENDED ORDER

I find that Respondents Lynell G. Skarda and CBC, Inc. each should pay a civil money penalty of $10,000, and that Respondents Langdon Skarda and Kent Carruthers each should pay a civil money penalty of $5,000.[23] Respondents are directed to make

---

(Cont'd)
§ 1847(a) for the proposition that this proceeding is designed to produce a "conviction" on the order of criminal punishment (Resp. Brief 33, 37) is misplaced. As Respondents otherwise recognize, (Resp. Brief 26, 28), this is an administrative civil proceeding brought under 12 U.S.C. § 1847(b).

22. Because imposition of civil money penalties is inherently fact-specific, penalty amounts assessed in other cases shed no light-on the reasonableness of the Board's assessments in the circumstances of this case. Respondents' references to amounts assessed in other banking cases are therefore of negligible relevance (and the citations to *nonbanking* cases are of no relevance whatever). To the extent that Tenth Circuit law on civil money penalties controls, the most apposite case is *Burke v. Board of Governors*, 940 F.2d 1360 (10th Cir. 1991)(upholding penalties of $600,000 each against bank holding company officials for violations of cease and desist orders).

23. As a supplement to this decision, "Findings of Fact" and "Conclusion
(Cont'd)

payment of the indicated amounts within 30 days of the effective date of this recommended order according to such administrative directions as may be given by the Board of Governors of the Federal Reserve System.

s/ Paul S. Cross

By Paul S. Cross, Administrative Law Judge on the 9th day of July, 1992.

(Cont'd)
of Law" are attached as an appendix. These are in the form of a numbered chronology and they greatly assist understanding of this matter. I adopt them exactly as they were submitted to me by Board counsel.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

Docket No. 90-033-CMP-BHC
90-033-CMP-I1
90-033-CMP-I2
90-033-CMP-I3

In the Matter of
CBC, INC.,
Clovis, New Mexico

and

In the matter of
LYNELL G. SKARDA,
LANGDON L. SKARDA, and
KENT CARRUTHERS,

Institution-Affiliated Parties of
CBC, Inc.,
Clovis, New Mexico

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

1. CBC, Inc. is a corporation existing and doing business under the laws of the State of New Mexico and has its principal

place of business in Clovis, New Mexico, and has been at all times pertinent to this case a bank holding company registered with the Board of Governors of the Federal Reserve System ("Board") under the Bank Holding Company Act of 1956 ("BHC Act"). Stipulation of Fact ("Stip.") 2.

2. From January, 1983 until December 31, 1985, the consolidated banking assets of CBC and its subsidiary bank, the Citizens Bank of Clovis, Clovis, New Mexico (the "Bank"), were not less than $100 million in each year. Stip. 4.

3. From January 1, 1986 until the initiation of this case in April, 1991, the consolidated assets of CBC and the Bank were not less than $150 million in each year. Stip. 4.

4. Lynell G. Skarda is and has been at all times pertinent to this case the Secretary-Treasurer, a director, and a principal shareholder of CBC, and has participated and continues to participate in the conduct of the affairs of CBC. Stip. 5, 6.

5. Langdon L. Skarda is and has been at all times pertinent to this case, the Vice President, a director, and a principal shareholder of CBC, and has participated and continues to participate in the conduct of the affairs of CBC. Stip. 5.

6. Kent Carruthers is and has been at all times pertinent to this case the President of CBC, a director of CBC, and has participated and continues to participate in the conduct of the affairs of CBC.

7. At all times pertinent to this case, Lynell G. Skarda, Langdon Skarda, and Kent Carruthers knew that CBC was required to complete and file a Federal Reserve Form FR Y-6.

Appendix A

8. The Board duly issued Form FR Y-6, as amended in 1985, prescribing the manner and form for the submission of annual reports by bank holding companies. 50 Fed. Reg. 50956 (December 13, 1985). Stip. 17.

9. Federal Reserve Form FR Y-6, which implements the Board's authority under section 5 of the BHC Act and implements the Board's Regulation Y (12 C.F.R. § 225 *et seq.*), contains instructions that require a bank holding company to file with the applicable Reserve Bank an annual report of the company's operation within three months of the end of the company's fiscal year. The instructions on the FR Y-6 Form currently and since 1986 require each bank holding company with consolidated assets of $150 million or more to submit the company's two most recent comparative annual financial statements, on both a consolidated and parent-only basis. The instructions require the consolidated financial statements to be certified by an independent public accountant ("Certified Financial Statements") and to be prepared in accordance with generally accepted accounting principles. Stip. 7.

10. In 1986, CBC filed a petition in the United States Court of Appeals for the Tenth Circuit challenging the Board's reporting requirements, including that of Certified Financial Statements. Stip. 22.

11. On August 30, 1988, the United States Court of Appeals for the Tenth Circuit upheld the Board's reporting requirements, including that of Certified Financial Statements, and upheld the Board's statutory authority for the reporting requirements. Stip. 24; *see CBC v. Board of Governors,* 855 F.2d 688 (10th Cir. 1988), *cert. denied,* 489 U.S. 1096 (1989).

Appendix A

12. CBC sought review in the United States Supreme Court, but did not seek a stay of the mandate of the Court of Appeals. Stip. 27. On March 27, 1989, the Supreme Court denied CBC's petition for certiorari. Stip. 28.

13. On March 21, 1989, Lynell G. Skarda signed and submitted CBC's FR Y-6 Form for 1988. The FR Y-6 Form did not include Certified Financial Statements and was not prepared in accordance with generally accepted accounting principles. Stip. 31.

14. On April 25, 1989, a representative of the Federal Reserve Bank of Dallas wrote to Kent Carruthers, President of CBC, to inform him that the submission for 1988 did not meet the filing requirements since it did not contain Certified Financial Statements. The letter advised CBC to file Certified Financial Statements by June 15, 1989. Stip. 34.

15. On May 9, 1989, Lynell G. Skarda, on behalf of CBC, replied to the Reserve Bank's letter. He did not submit Certified Financial Statements, but submitted a "Report of Agreed on Procedures by Grant Thornton" (the "Grant Thornton Report"). Grant Thornton is a public accounting firm. Stip. 30, 34.

16. The Grant Thornton Report did not meet the Board's requirements in that it did not include consolidated statements for CBC and the Bank, and the information provided was not certified by the accounting firm. The Grant Thornton Report specifically stated that, because the procedures performed did not constitute an examination made in accordance with generally accepted auditing standards, no opinion could be expressed. As of June 15, 1989, CBC still had not filed a report for 1988 that complied with the requirements of the BHC Act and Regulation Y. Stip. 35.

Appendix A

17. The Reserve Bank's Report of Inspection of CBC sent to CBC's board of directors on December 31, 1989 stated that CBC's 1988 FR Y-6 Form did not meet the Board's requirements. Stip. 36.

18. On March 29, 1990, Lynell G. Skarda submitted CBC's FR Y-6 Form for December 31, 1989 to the Reserve Bank. This form included Certified Financial Statements for 1989, but not for 1988. Stip. 38; Exhibit 37.

19. In May 1990 the Reserve Bank advised CBC that the submitted FR Y-6 Form for December 31, 1989 did not meet the Board's requirements, since the report required information for a two-year period (1988 and 1989) and the 1988 financial statements did not comply with the Board's requirements. Stip. 39.

20. As of the initiation of this case in April, 1991, CBC had not filed FR Y-6 Forms for 1988 that met the Board's requirements. Stip. 46.

21. On June 21, 1990, the Board's General Counsel wrote CBC, Lynell and Langdon Skarda and Kent Carruthers to inform them of the Board staff's intent to recommend the assessment of civil money penalties against them. The letters requested that the Respondents submit financial statements and any evidence that would mitigate against the assessment of a civil money penalty. Stip. 39; Exhibit 38.

22. On July 5, 1990, Lynell G. Skarda replied on behalf of all the Respondents to the General Counsel's letter. The reply did not include any financial information. Stip. 42; Exhibit 41.

23. In a September 27, 1990 letter to a Board representative, Lynell G. Skarda suggested an audit of the statement of condition

of the Bank and CBC as of December 31, 1988, by Boatright, Kelly & Co. Stip 45; Exhibit 44. Such an audit in fact was not conducted. Stip. 46.

24. On April 13, 1991, Lynell G. Skarda received a Notice of Assessment, Docket No. 90-033-CMP-Il, assessing a $10,000 civil money penalty; Langdon L. Skarda was served with Docket No. 90-033-CMP-I2 assessing a $5,000 civil money penalty; Kent Carruthers received Docket No. 90-033-CMP-I3 assessing a $5,000 civil money penalty, and as President of CBC he received Docket No. 90-033-CMP-BHC assessing a $10,000 civil money penalty against CBC, all of which had been issued by the Board on April 5, 1991. Stip. 47.

B. RECOMMENDED CONCLUSIONS OF LAW

1. CBC has at all times relevant to this case been subject to the BHC Act and the rules, regulations, and applicable reporting requirements of the Board.

2. Section 5(c) of the BHC Act (12 U.S.C. § 1844(c)) authorizes the Board to require registered bank holding companies to make reports to the Board of their condition under oath. Section 225.5(b) of Regulation Y (12 C.F.R. § 225.5(b)), which implements section 5(b) of the BHC Act, requires each bank holding company to furnish, in the manner and form prescribed by the Board, an annual report of the company's operation for each year that the company remains a bank holding company. Pursuant to Regulation Y, § 225.5(b), the Board duly issued Form FR Y-6 prescribing the manner and form of annual reports by a bank holding company.

3. The instructions on Federal Reserve Form FR Y-6 require

each bank holding company to submit an annual report within 90 days of the end of the company's fiscal year. The instructions require the company to submit its two most recent comparative annual financial statements and require a company with consolidated assets in excess of $150 million to file financial statements representing the position of the holding company as consolidated with its subsidiaries, as well as for the parent company only. The instructions require that the consolidated financial statements for a bank holding company with consolidated assets in excess of $150 million be certified by an independent public accountant. All financial statements should be prepared in accordance with generally accepted accounting principles. Form FR Y-6 further reserves to the Federal Reserve System the right to require the filing of additional statements and information if it regards the information submitted on the FR Y-6 Form to be insufficient.

4. Section 8(b) of the BHC Act, 12 U.S.C. § 1847(b), both before and since the 1989 amendments to the BHC Act, provides for civil money penalties against a bank holding company that violates any provision of the BHC Act or any regulations or orders issued pursuant thereto, and against any individual who participates in a violation, which incudes any action participating in, counseling, or aiding and abetting a violation.

5. Since August, 1989, section 8(d) of the BHC Act provides for civil money penalties of varying amounts (ranging from $2,000 per day to $1,000,000 per day) against any company that fails to submit the reports or information required by the BHC Act or any regulation, including Regulation Y, that implements the BHC Act. 12 U.S.C. § 1847(d).

6. By filing its FR Y-6 Forms for December 31, 1988 and

Appendix A

December 31, 1989 without Certified Financial Statements for 1988, CBC violated sections 5(c), 8(b) and 8(d) of the BHC Act, and section 225.5(b) of Regulation Y, pursuant to which each bank holding company is required to submit reports and information in the form and substance prescribed in Form FR Y-6.

7. The violations by CBC of sections 5(c), 8(b) and 8(d) of the BHC Act and section 225.5(b) of Regulation Y commenced with the filing of CBC's FR Y-6 Form for December 31, 1988 on March 21, 1989, and were outstanding for a period of at least 600 days as of the initiation of this case.

8. In light of the size of CBC's financial resources, the company's good faith, the gravity of the violations, the absence of previous violations, and such other matters as justice may require, a civil money penalty against CBC in the amount of $10,000 is justified.

9. Lynell G. Skarda, an officer and director of CBC with knowledge of the reporting requirements and CBC's noncompliance with those requirements, caused, brought about, participated in and aided and abetted CBC's violations of the BHC Act and Regulation Y. In so doing, Lynell G. Skarda violated sections 5(c), 8(b), and 8(d) of the BHC Act and section 225.5(b) of Regulation Y.

10. In light of the size of Lynell G. Skarda's financial resources, his good faith, the gravity of the violations, the absence of previous violations, and such other matters as justice may require, a civil money penalty against Lynell Skarda in the amount of $10,000 is justified.

11. As an officer and director of CBC, with knowledge of the

reporting requirements and CBC's noncompliance with those requirements, Langdon L. Skarda caused, brought about, participated in and aided and abetted CBC's violations of the BHC Act and Regulation Y. In so doing, Langdon L. Skarda violated sections 5(c), 8(b), and 8(d) of the BHC Act and section 225.5(b) of Regulation Y.

12. In light of the size of Langdon L. Skarda's financial resources, his good faith, the gravity of the violations, the absence of previous violations, and such other matters as justice may require, a civil money penalty against Langdon Skarda in the amount of $5,000 is justified.

13. As an officer and director of CBC, with knowledge of the reporting requirements and CBC's noncompliance with those requirements, Kent Carruthers caused, brought about, participated in and aided and abetted CBC's violations of the BHC Act and Regulation Y. In so doing, Kent Carruthers violated sections 5(c), 8(b), and 8(d) of the BHC Act and section 225.5(b) of Regulation Y.

14. In light of the size of Kent Carruthers's financial resources, his good faith, the gravity of the violations, the absence of previous violations, and such other matters as justice may require, a civil money penalty against Kent Carruthers in the amount of $5,000 is justified.

APPENDIX B — FINAL DECISION AND ORDER OF BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM DATED NOVEMBER 17, 1992

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

Docket No. 90-033-CMP-BHC
90-033-CMP-I1
90-033-CMP-I2
90-033-CMP-I3

In the Matter of
CBC, INC.,
Clovis, New Mexico

and

In the matter of
LYNELL G. SKARDA,
LANGDON L. SKARDA, and
KENT CARRUTHERS,

Institution-Affiliated Parties of
CBC, Inc.,
Clovis, New Mexico

Respondents.

FINAL DECISION AND ORDER

This is an administrative civil money penalty action by the Board of Governors of the Federal Reserve System (the "Board")

against a bank holding company, CBC, Inc. ("CBC"), and three officers and directors of CBC, Lynell G. Skarda, Langdon L. Skarda, and Kent Carruthers (collectively "Respondents").

On April 5, 1991, the Board issued Notices of Assessment of Civil Money Penalties (the "Notices") against each of the Respondents pursuant to 12 U.S.C. § 1818(i)(2) and 12 U.S.C. § 1847(b). The Notices alleged, *inter alia*, that the individual Respondents have been responsible for CBC's failure to file annual reports with the Board containing consolidated financial statements for the year 1988 that have been certified by an independent public accountant, as required by the Board's Regulation Y and Form FR Y-6.[1] As explained in the Notices, CBC failed to comply with the Board's requirements in connection with the 1988 and 1989 Y-6 reports filed by CBC in March, 1989 and March, 1990 respectively, even though on August 30, 1988, those requirements were upheld by the United States Court of Appeals for the Tenth Circuit in litigation commenced by CBC against the Board.[2]

The Board's Notices assessed penalties in the amounts of

---

1. The Board's Form Y-6 requires each bank holding company to submit an annual report within 90 days of the end of the company's fiscal year. The report must include the company's most recent two year comparative financial statements. Thus, financial statements for 1988 would be submitted with both the 1988 and 1989 Y-6 reports.

In addition, a company with total consolidated assets of $150 million or more must file consolidated financial statements that are certified by an independent public accountant and that are prepared in accordance with generally accepted accounting principles.

2. *CBC. Inc. v. Board of Governors*, 855 F.2d 688 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).

$10,000 each against CBC and Lynell Skarda and $5,000 each against Langdon Skarda and Kent Carruthers. Respondents opposed the Board's assessments and requested a hearing. The case was subsequently referred to Administrative Law Judge Paul S. Cross.

In this case, the material facts are not disputed by the parties. Instead, respondents dispute whether, in light of the uncontested facts, an assessment of civil money penalties is warranted. Respondents also contest the amount of the penalties that should be assessed. Accordingly, the parties entered into written stipulations as to the relevant facts upon which these matters should be decided. After the parties submitted proposed findings of fact and conclusions of law, an oral argument was held before the Administrative Law Judge on June 1, 1992.

Based on the stipulated facts, the pleadings submitted, and the arguments made at the hearing, the Administrative Law Judge issued a recommended decision and order on June 9, 1992, in which he recommended that the Board impose penalties against each of the Respondents in the amounts set forth in the Notices. The Judge also adopted proposed findings of fact and conclusions of law. On July 15, 1992, Respondents filed exceptions to the Judge's recommended decision and order and to his proposed findings and conclusions.

Upon review of the administrative record, including the exceptions filed by Respondents, the Board hereby issues its Final Decision and Order. The Board adopts, and incorporates herein by reference, the Administrative Law Judge's Decision and Recommended Order and proposed Findings of Fact and Conclusions of Law, as supplemented below, together with the reasoning and citations contained therein. Accordingly, the Board

hereby assesses civil money penalties in the amounts of $10,000 each against CBC and Lynell G. Skarda; and $5,000 each against Langdon L. Skarda and Kent Carruthers.

Pursuant to the applicable statutes, the Board must take into account the appropriateness of the penalties with respect to several mitigating factors: the size of financial resources and good faith of each of the Respondents; the gravity of the violations, the history of previous violations and such other matters as justice may require. 12 U.S.C. §§ 1847(b)(2), 1818(i)(2)(G). In light of the fact that the parties have stipulated to the material facts and because the legal issues were determined previously by the Court of Appeals, the Board has focused particular attention on those factors.

In considering the "gravity" of the violations, the Board notes that its reporting requirements are central to its responsibility to supervise bank holding companies. The requirement of certified financial statements ensures that the accounting systems and internal controls of a holding company will be reviewed by independent experts. The certification provides the Board with an increased measure of reliability regarding the financial statements. *See CBC, Inc. v. Board of Governors, supra,* 855 F.2d at 691. The independent audit makes it easier to uncover fraud, misappropriation, or negligence in the operation of the institution. Respondents' refusals to comply with the applicable reporting requirements, were not trivial, nor were they technical deficiencies. Penalties are warranted in order to deter Respondents and others from future noncompliance.

Respondents' willful and continuing noncompliance following CBC's unsuccessful legal challenge evidences a lack of good faith. The record reflects that in March, 1987 the Board expressly denied CBC's request for a stay of the certification

requirement while the litigation was pending. CBC never sought a stay of the Board's requirements from the court. Thus, after the Board's requirements were upheld by the Court of Appeals in 1988, good faith required that Respondents abide by the Court of Appeals' ruling with respect to the 1988 financial statements.

CBC's financial statements for subsequent years have been certified in compliance with the Board's requirements. This has been considered as a mitigating factor that weighs against assessing larger penalties in this case, but it is not sufficient in light of the other factors discussed below to lead the Board to conclude that no penalties should be assessed in this case.

The Board is also authorized to consider "such other factors as justice may require." 12 U.S.C. §§ 1847(b)(2), 1818(i)(2)(G). The Board believes that one such factor is whether the parties involved in the violations derived any economic benefit from the misconduct. *See* 12 C.F.R. § 263.62. Respondents submitted evidence for the record indicating the likely cost of obtaining certified financial statements for the 1988 fiscal year. This cost was estimated by an accounting firm to be approximately $30,000 to $60,000. CBC also asserted that it actually paid about $10,000 to obtain non-certified statements from an independent accounting firm. Thus, CBC saved between approximately $20,000 and $50,000 in auditor's fees. Under these circumstances, the penalties assessed by the Board, which total $30,000, are reasonably calculated to ensure that Respondents do not derive substantial economic benefit from the violations.[3]

---

3. There is no authority to support Respondents' claim that the Board must consider as a mitigating factor, the amounts that they have expended in defending this proceeding.

Appendix B

Respondents attempt to compare the Board's assessments in this case to the amounts assessed in other cases. Such comparisons are of little relevance. A determination as to the appropriate amount of any monetary penalty necessarily depends on the facts and circumstances of the particular case. Thus, the amounts assessed in the cases cited by Respondents are not useful in this case.

The Board also offered Respondents an opportunity to demonstrate that their financial resources warranted the assessment of smaller amounts. On June 21, 1990, the Board's General Counsel wrote to Respondents to advise them that the Board's staff intended to recommend the assessment of civil money penalties against them. At that time, Respondents were requested to submit financial statements and any evidence that would mitigate against the assessment of a civil money penalty. On July 5, 1990, a reply was submitted on behalf of all of the Respondents, but no financial information was included. Respondents also failed to submit any such information to the Administrative Law Judge.

Evidence concerning the size of a respondent's financial resources is inherently within the control of the respondent. Consequently, the Board does not carry the entire burden of proof concerning the Respondents' financial condition. *See Stanley v. Board of Governors*, 940 F.2d 267, 274 (7th Cir. 1991). After giving Respondents an opportunity to supplement the record, which they did not take, the Board has based its assessments on the information available to it from reports of inspections of CBC and from reports of examinations of CBC's subsidiary bank.

Together, Lynell and Langdon Skarda own over 99 percent of CBC's shares. CBC's assets largely consist of its investment in its

subsidiary bank. CBC's total equity was $18.2 million as of December 31, 1990 and was $15.3 million as of June 30, 1991.[4] CBC has received substantial dividends from its subsidiary bank in recent years, which in turn have been used by CBC to pay substantial dividends to its shareholders. The record also reflects that as the president of CBC's subsidiary bank, Kent Carruthers receives compensation adequate to support the penalty assessed against him. Thus, the amounts assessed are consistent with each Respondent's financial resources and do not constitute any undue burden.

There are mitigating factors weighing in Respondents' favor, such as the fact that for 1989 and all subsequent years, CBC has complied with the certification requirements. However, the relatively small amounts assessed are consistent with this fact and the fact that Respondents do not have a history of other violations.

The violations charged in this case are continuing. They have been outstanding since March 29, 1989, the date on which CBC's Y-6 report for 1988 was filed. Consequently, as of April 5, 1991, the date that the Board's Notices were issued, the total amount that could have been assessed against each of the Respondents was over $600,000. After consideration of the required factors, however, the Board has assessed penalties representing only a fraction of the maximum amount authorized by the statute. Nevertheless, the assessments reflect the Board's judgment that the imposition of penalties for the Respondents' knowing violation of the Board's reporting requirements is appropriate in order to deter future noncompliance.

The greater amounts imposed upon CBC and Lynell Skarda

---

4. The June 30, 1991 data was not yet available at the time the Board's Notices were issued.

are warranted because CBC is the principal offender along with Lynell Skarda, who as controlling shareholder of CBC has played the leading role in orchestrating CBC's noncompliance.

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(i) of the Federal Deposit Insurance Act, as amended (12 U.S.C. § 1818(i)), and section 8(b) of the Bank Holding Company Act, as amended (12 U.S.C. § 1847(b)), that the below-named respondents are hereby assessed, and shall forfeit and pay as hereinafter provided, civil money penalties in the amounts specified below:

1. CBC, Inc. is hereby assessed and shall forfeit and pay a civil money penalty in the amount of Ten Thousand Dollars ($10,000);

2. Lynell G. Skarda is hereby assessed and shall forfeit and pay a civil money penalty in the amount of Ten Thousand Dollars ($10,000);

3. Langdon L. Skarda is hereby assessed and shall forfeit and pay a civil money penalty in the amount of Five Thousand Dollars ($5,000); and

4. Kent Carruthers is hereby assessed and shall forfeit and pay a civil money penalty in the amount of Five Thousand Dollars ($5,000).

IT IS FURTHER ORDERED, that payment of the assessed penalties set forth herein shall be made on or before the sixtieth day following the effective date of this Order, payable in full to the order of the Board of Governors of the Federal Reserve System, who shall make remittance of the same to the Treasury of the United States as required by statute. Payment of the assessed penalty shall be transmitted to:

Appendix B

William W. Wiles, Secretary
Board of Governors of the
Federal Reserve System 20th and C Streets, N.W.
Washington, D.C. 20551.

By order of the Board of Governors, effective this 17th day of November, 1992.

s/ William W. Wiles
William W. Wiles
Secretary of the Board